April 19, 2002

REPORT AND RECOMMENDATIONS OF THE

JUDICIAL COMPENSATION COMMITTEE

Submitted to: The Minister of Justice and Attorney General
for the Province of Manitoba

COMMITTEE:

Martin H. Freedman, Q.C., Chair
Harold G. Piercy, Nominee of The Manitoba Provincial Judges' Association
Victor H. Schroeder, Q.C., Nominee of the Province of Manitoba

COUNSEL:

Robb Tonn and Susan Dawes, for The Manitoba Provincial Judges' Association
E. William Olson, Q.C., for the Province of Manitoba
John M. Scurfield, Q.C., for the Masters of the Court of Queen's Bench

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1. Introduction

1.1 The Provincial Court Act

Chapter C275 of the Statutes of Manitoba, The Provincial Court Act (the "Act") contains provisions, inter alia, for a process dealing with compensation of Provincial Court Judges ("Judges"). Section 11.1 (1) states:

> **"The Minister shall, once every two years, commencing in 1990, cause a Compensation Committee, to be known as the Judicial Compensation Committee, to be established to review, determine and report to the Minister on, the salaries and benefits payable to judges, including pensions, vacations, sick leave, travel expenses and allowances."**

The report of a Judicial Compensation Committee (sometimes herein referred to as a "JCC") is to be tabled by the Minister in the Legislature and then referred to a standing committee of the Legislature which is to report "on the recommendations of the compensation committee". Thereafter the Legislative Assembly receives and votes on the report of the standing committee and the provincial government is to implement the report in accordance with the vote.

The foregoing provisions in the Act were introduced in 1989. As will be noted below, new legislation, effective April 1, 2002, has essentially replaced these provisions. The present Judicial Compensation Committee is the last to be appointed

pursuant to the provisions of the Act referred to above.

1.2 Order in Council

The Act provides that a JCC is appointed by the Lieutenant Governor in Council, and consists of one person designated by the Judges and two other persons designated by the Minister, one of whom shall be Chair of the JCC.

On February 21, 2001 the Lieutenant Governor in Council enacted Order in Council 62/2001 pursuant to the provisions of the Act. Mr. Harold Piercy had been designated by the Judges to be a member of this JCC ("JCC4") and the Order in Council appointed him as a member. Mr. Victor H. Schroeder was appointed as a member of JCC4 (as the Province's designate). Mr. Martin H. Freedman, who had earlier received the consent of the Judges to his appointment, was also appointed a member of JCC4 and was designated as Chair. The Order in Council was stated to "be effective immediately".

2. Background/Context

2.1 Previous Judicial Compensation Committees

This is the fourth report of a Judicial Compensation Committee. Later in this Report we will make note of some of the recommendations of all three previous JCCs. The first JCC ("JCC1") was appointed on August 8, 1990. The members of JCC1 were Mr. Harold Piercy and Mr. Charles Curtis as nominees respectively of the Judges and the Province, and Mr. Donald Baizley as Chair. JCC1 submitted its Report on June 7, 1991, making certain recommendations regarding Judges' salaries and pensions. The Report was considered by the Province in June, 1992, and certain adjustments were subsequently made in judicial salaries and pensions.

The second JCC ("JCC2") was appointed on October 7, 1992. Mr. Piercy was again the nominee of the Judges, and Mr. Julian D. Benson was the nominee of the Province. Mr. John D. Greene was designated as Chair. JCC2 did not report until December, 1995. Reduced work week legislation had been introduced, and a challenge by the Judges in relation to that legislation as it affected the Judges had been made. In its Report, JCC2 made recommendations regarding Judges' salaries and pensions. The Report was considered by the Province in late 1996, and the Province acted upon certain of the recommendations.

The third JCC ("JCC3") was appointed in January, 1997. Mr. Piercy was again the nominee of the Judges, Mr. Tom Farrell was the nominee of the Province and Mr. Greene was again designated as Chair. JCC3 submitted its Report in June, 1998, making recommendations on Judges' salaries and pensions (and other matters). The Province considered the Report later in 1998, accepting and acting upon some of the recommendations and rejecting other recommendations.

2.2 Decision of the Supreme Court of Canada

The Judges launched a court challenge to the Province's reduced work week legislation. That challenge, together with other cases from the provinces of Alberta and Prince Edward Island, made its way through the courts to the Supreme Court of Canada. In September, 1997, the Supreme Court issued its decision in a judgment which is a milestone in the evolution of the Canadian judicial process. The decision, over 200 pages in length, embodies in the common law many important principles relating to the position of judges of provincial courts.

Among many other matters the Supreme Court affirmed the necessity of a body such as this Judicial Compensation Committee in ensuring judicial independence. In a previous case (**Valente**, (1985) 2 SCR 673) the Court had referred

to the three "core characteristics" of judicial independence as security of tenure, financial security and administrative independence. In its 1997 decision the Court said in a decision written by then Chief Justice, Lamer, C.J:

> **"133 . . . any changes to or freezes in judicial remuneration require prior recourse to a special process, which is independent, effective, and objective, for determining judicial remuneration . . . What judicial independence requires is an independent body . . . to set or recommend the levels of judicial remuneration . . . Governments are constitutionally bound to go through the commission process. The recommendations of the commission would not be binding on the executive or the legislature. Nevertheless, though those recommendations are non-binding, they should not be set aside lightly and, if the executive or the legislature chooses to depart from them, it has to justify its decision - if need be, in a court of law . . .**
>
> **166 . . . The constitutional function of this body [judicial compensation committee] is to depoliticize the process of determining changes or freezes to judicial remuneration . . .**
>
> **171 . . . In addition to being independent, the salary commissions must be objective. They must make recommendations on judges' remuneration by reference to objective criteria, not political expediencies. The goal is to present 'an objective and fair set of recommendations dictated by the public interest' . . . the commission's objectivity can be promoted by ensuring that it is fully informed before deliberating and making its recommendations . . . I recommend . . . that the objectivity of the commission be ensured by including in the enabling legislation or regulations a list of relevant factors to guide the commission's deliberations . . . A list of relevant factors might include for example, increases in the cost of living, the need to ensure that judges' salaries remain adequate, as well as the need to attract excellent candidates to the judiciary."**

After explaining that for the JCC to be effective the executive or the legislature (whichever body is mandated to do so) must consider and respond to its Report, the Chief Justice said that if the executive or legislature chooses not to accept one or more of the JCC's recommendations, then it must be prepared to justify that decision. At paragraph 183 the Chief Justice said that the standard of justification is "**one of simple rationality**".

2.3 Decision of Manitoba Court of Queen's Bench (Wright, J.)

JCC3 was appointed in January, 1997, at a time when the process culminating in the release of the Supreme Court's decision on December 18, 1997, was well under way. JCC3 held hearings a few months after the release of that decision, and in its Report made reference to the decision.

JCC3 made a number of recommendations. It made no explicit analysis of the cost of any one or more of its recommendations. The Report was considered by the Province in late 1998 and early 1999. All but three recommendations were accepted. Those that were not related to parking, pensions and participation in costs. The Judges challenged the decision by the Province to reject those three recommendations of JCC3. The matter came before Mr. Justice Wright of the Court of Queen's Bench

who rendered his judgment on July 27, 2001. There has been no appeal taken from the decision which therefore stands as the final word on the Province's response to the Report of JCC3. Mr. Justice Wright found that the rejection of the parking recommendation was on "a rational basis" but that the other two rejections were not.

The Province had rejected the recommendation of JCC3 that the supplementary pension benefit for Judges be extended to cover service prior to July 1, 1992. The stated reasons, inter alia, of the Province (i.e., it adopted the reasons of the standing committee) were: (1) that the Judges' pension arrangements "are significantly better than those of provincial employees and are currently among the most generous in Manitoba"; (2) that the cost to implement the recommendation "given the other significant improvements in judges' compensation is unacceptably high"; and (3) that the recommendation to provide Judges with improved pension credits for service prior to July 1, 1992, effectively increasing Judges' compensation for their services at that time, was for "a period during which judges' compensation was [not] under review by [JCC3]".

After a thorough review of the Province's response to the Report of JCC3, Mr. Justice Wright found that the Province had not met the standard mandated by the Supreme Court (i.e., simple rationality) in articulating its reasons for rejection of the

Report. He noted in several parts of his reasons for judgment such observations as "nothing is provided in support . . .", "no analysis" and so on. In the result, inter alia, all judicial service is considered pensionable.

At paragraph 57 Mr. Justice Wright said:

> "**The report of JCC#3 reveals a broad consideration of multiple factors in determining appropriate compensation and other benefits for Manitoba's provincial judges. The report shows the committee endeavoured to apply a fair balance between conflicting elements relating to judicial independence on the one hand and the economic realities of the Province on the other, all in the context of sensible comparisons with the position of judges relative to others in our society both within and without Manitoba.**"

In this Report we shall attempt to adhere to the standard approbated by Mr. Justice Wright.

2.4 Amendments to The Provincial Court Act

The current scheme for the establishment and functioning of a JCC has existed for approximately 12 years. In 2001, the Province enacted amendments to the Act effecting significant changes to the JCC process. These changes, set out in Bill 46, include the following:

a) On or before April 1, 2002 and on or before April 1, in every third year after 2002, a JCC is to be appointed;

b) The JCC is charged with the responsibility to "investigate, report and make recommendations" with respect to the salaries and benefits of Judges including pensions, vacations, sick leave, disability benefits, travel expenses and allowances;

c) The recommendations of a JCC "must be made for the fiscal year of the government that begins on April 1 of the year in which the compensation committee is appointed, and for each of the next two fiscal years";

d) The JCC is directed, to the greatest extent possible, to conduct its review in an inquisitorial manner;

e) The JCC is required to consider a number of factors including (these are listed in section 11.1 (16)):

"a) the nature of the judges' role and the independence of the judiciary;
b) the need to attract and retain excellent applicants to the judiciary and the statistics with respect to the recruitment, retention, resignation and retirement of judges;
c) the need to provide fair and reasonable compensation for judges in light of prevailing economic conditions in Manitoba and the overall economic and financial state of the Manitoba economy;
d) the principle that public resources must be managed efficiently and effectively in the context of the government's current financial position;
e) the cost of living and the growth or decline in real per capita income in Manitoba; and
f) the manner in which the compensation package paid to judges in Manitoba compares to judicial compensation packages in other jurisdictions in Canada, having regard to the differences between jurisdictions."

f) The report of the JCC must set forth information with respect to salaries of judges in New Brunswick, Nova Scotia and Saskatchewan;

g) Certain recommendations are binding on both the Province and the Judges, and in particular salary recommendations are binding provided that the

recommended salary is equal to or less than, for the particular year, the average of the salaries for that year of the Judges' counterparts in New Brunswick, Nova Scotia and Saskatchewan; and

h) The Judges are entitled to costs as prescribed in the regulations with respect to their participation in the JCC process.

Section 12.3 in Part 3 of Bill 46 expressly states that the provisions of the Act which are enacted by Bill 46 do not apply to JCC4 or to its Report or recommendations.

2.5 Masters of the Court

Bill 46 received Royal Assent on July 6, 2001. It includes amendments to The Court of Queen's Bench Act which provide, in effect, that the Masters of the Court ("Masters") are entitled to receive the same salary and benefits as Provincial Court Judges, and that the Senior Master is entitled to receive the same salary and benefits as an Associate Chief Judge of the Provincial Court.

As a result of those changes and earlier changes to The Court of Queen's Bench Act (referred to in section 12 of this Report) this JCC was vested with the jurisdiction to consider compensation and benefits of the Masters. We received a submission on behalf of the Masters, and a response from the Province, which we

will discuss below. The Masters asserted, and the Province agreed, that our determination as to salary and benefits for Judges automatically applies to the Masters effective July 6, 2001. Section 12 of this Report deals with the issues raised by the Masters.

3. Process/Submissions

We held hearings over six days, in late October and early November, 2001. We received written submissions from the Judges and the Province and heard evidence from consulting actuaries for each of those participants. We also received an oral submission on behalf of the Canadian Bar Association.

The submissions from the Judges and the Province were extensive and detailed. The Judges' written submission comprised approximately 130 pages and was supplemented by five binders of exhibits. We also received from the Judges a written reply in relation to the submission of the Province. The Province's written submission comprised 35 pages, and was also supplemented by a number of exhibits. We received from the Province a response submission of some 65 pages, also supplemented by exhibits.

The only formal evidence we heard was from the two consulting actuaries, each of whom testified regarding pensions and each of whom also provided us with a number of documents. Through the course of the submissions, which were relatively informal in nature, a considerable amount of information was provided to us, as well as arguments on behalf of the participants.

We are satisfied that we have had a complete airing of all issues which are relevant for the purposes of this Report, and that the material that we have reviewed provides us with a satisfactory base for our recommendations.

4. Position of The Manitoba Provincial Judges' Association

4.1 Court Profile

As of the date of our hearings there were 40 Judges, two of whom were each designated as Associate Chief Judge and one of whom was designated as Chief Judge. All these Judges are full time appointments. About 75% of the Judges live in Winnipeg and the others live in a small number of other centres in Manitoba. Twenty-nine of the Judges (73%) are male and 11 (27%) are female). The average age of the Judges is 55.9 years and the average length of judicial service of the Judges is 13.3 years. The average age at appointment was 42.9 years.

There is no compulsory retirement age for Judges. With the average age of appointment at 42.9 years, a Judge who chooses to retire at age 65 would have accumulated 22.1 years of service. As at July 1, 2001, 13 of the Judges had more than 20 years service, 11 had between 11 and 20 years service, 6 had between 6 and 10 years service and 10 had up to 5 years service.

A significant number of Judges have been appointed from a background of employment in the public sector of Manitoba. Almost half (17) of the current Judges were appointed from previous employment with either the Department of Justice as a Crown Attorney (12) or Legal Aid (5). The other Judges (23) came from private practice.

The statutory requirement for judicial appointment is at least 5 years membership in good standing in the Bar. Superior Court Judges (i.e., Court of Queen's Bench or Court of Appeal) are required to have at least 10 years standing.

4.2 Issues Raised by The Manitoba Provincial Judges' Association

Later in this Report we will outline in some detail the rationale of the Judges for the various requests they put before us. We will do the same with the position of

the Province in respect of those matters. The following is simply a list of the issues which the Judges raised, regarding which written and oral submissions were made, and upon which we will report and make recommendations later in this Report. Those issues are:

a) Compensation:
   - i) Salary;
   - ii) Lump sum compensation for past losses;
   - iii) Vacations;
   - iv) Sick leave;
   - v) Disability coverage;
   - vi) Life insurance;
   - vii) Travel expenses;
   - viii) Professional allowance;
   - ix) Education allowance;
   - x) Severance pay;
   - xi) Compassionate leave;
   - xii) Family related leave;
   - xiii) Maternity, paternity and adoption leave;
   - xiv) Extended health care benefits;
   - xv) Equality among Judges on the bench; and
   - xvi) Past practices clause.

b) Pensions:
   - i) Structural issues in the design of the judicial pension plan;
   - ii) Unequal treatment of Judges from different backgrounds;
   - iii) The stand alone plan;
   - iv) Maximum pension;
   - v) Definition of pensionable salary;
   - vi) Retroactive application;
   - vii) Years of service required for full pension;
   - viii) Accrual rate;
   - ix) Survivor benefit;
   - x) Cumulative impact;
   - xi) Canada Pension Plan;
   - xii) Early retirement;
   - xiii) Disability;

xiv) Contribution rate;
xv) Indexing;
xvi) Contributions;
xvii) Membership and transitional issues;
xviii) Disability and indexing; and
xix) Other transitional issues.

c) Costs:
i) Legal and other fees.

The Judges said that in considering their requests a number of factors were relevant, including the independence of the judiciary, the importance of the Judge's role, the need to attract and retain the best candidates, Manitoba's economy, cost of living increases and the compensation packages of other provincial judges and the federally appointed judges. The Judges emphasized that their salaries should be linked in some way with other judges and in particular with federally appointed judges.

5. Position of Province

5.1 Total Compensation

The proposals of the Judges were wide ranging. The Province's main submission focused on matters of principle and affordability. In its response to the Judges' submission the Province dealt in detail with each of the specific requests of

the Judges. It would be fair to say that the principal stance of the Province was that compensation for Judges should be based on a "total compensation model". The Province referred to a "comparative examination of compensation on a comprehensive basis having regard for both pay and benefits", and recommended that we consider the total compensation of Judges consisting of all elements of their compensation including salary, pension and all other benefits. Non-quantifiable factors such as working conditions, hours of work and days of work, security of tenure and financial security were also relevant factors.

5.2. "Made in Manitoba"

Consistent with the position apparently taken before previous JCCs, the Province urged us to take into account "Manitoba economic conditions and the relative compensation levels of Manitoba workers". The Province argued that compensation of Judges should reflect the environment within which they function (i.e., the provincial environment) and "must bear some reasonable relationship to the citizens they serve". Only if it was alleged that remuneration had fallen below a basic level required for the office of Judge (and it was not so alleged) would it be appropriate to consider information from other jurisdictions. The Province urged us to take into account as a main factor this "made in Manitoba" approach.

There were other factors that the Province suggested were relevant, some of which will be reviewed in more detail in the appropriate parts of this Report, but they include such considerations as the compensation paid to senior Deputy Ministers in Manitoba, the fact that there appears to be no difficulty in obtaining qualified Judges and in retaining such Judges, the balanced budget legislation in force in Manitoba, Manitoba's economic circumstances, public sector settlements and some other factors.

5.3 Other

Although we are not engaged in an interest arbitration, there are some similarities in this process and that of an interest arbitration. We received proposals from the Judges and responses from the Province. While the Judges are not civil servants, and they function independently of government, the Province is responsible to pay the Judges, and they are, in the truest sense, as the Saskatchewan 1993 JCC said (p. 12), "public servants . . . appointed by the Executive Branch". There are elements in the relationship that are like the relationship between employee and employer. In the JCC process it has been the pattern that the Judges make requests or proposals, and the Province offers its views. Before us the Province was very careful not to do more than offer views (as distinct from making a specific offer).

Even when the Province appeared prepared to offer a benefit, recognizing the importance of adhering to the process outlined by the Supreme Court of Canada it did no more than state that "this committee could consider it appropriate to extend this improvement to Judges" or words to that effect.

6. General Principles

Both participants advanced what they asserted were concepts or principles which should guide our deliberations. We will comment on certain of these.

6.1 Judicial Independence

There is no dispute between the participants on the fundamental importance of the principle of judicial independence. Many reports of committees such as ours have stressed the significance of this concept. To quote one (the 1988 Ontario Commission, page 40):

> **"Judicial independence is an integral part of the heritage on which our legal system is built; it is a constitutive element of our political culture . . . it is crucial that those that preside in courts of law be able to do so without any appearance of interference from anyone . . ."**

As noted above, there are certain core characteristics of judicial independence. The Supreme Court of Canada has identified these as security of tenure, financial security and administrative independence. It has been observed that financial security has both individual and collective dimensions. Among the constituent elements of financial security is the depoliticization of the relationship between judges and the entity which has a relationship with them most like that of an employer (i.e., the payor of salaries and benefits), in this case the Province. This depoliticization underlies the concept of JCCs and, among other matters, is the reason for the Supreme Court's dictum that there be no changes to or freezes in judicial remuneration without prior recourse to a committee such as this. These principles are not disputed.

We are mainly concerned in this Report with the issue of financial security which, as the Judges correctly noted in their written submission (page 17), "is constitutionally protected primarily because it is in the public interest, rather than because of the benefit that it provides to the judiciary". It is essential that the Judges have an adequate sense, which must be grounded in reality, of financial security, so that in the discharge of their duties they are not distracted or susceptible of being influenced by matters of personal or collective financial concern. The ultimate purpose of ensuring financial security is that the judiciary will be impartial and that

the public will have confidence in the impartiality of the judiciary.

We refer again to the submission of the Judges (pages 18 et seq):

> **"The level of financial security necessary to provide for judicial independence is obviously difficult to quantify . . . it is something beyond what is merely adequate . . ."**

The Judges referred to the remarks of Professor Martin Friedland (1995):

> **". . . the greater the financial security the more independent the judge will be . . . it is a wise investment for society to err on the more generous side. Even if economic conditions were such that a very large portion of the bar was willing to accept an appointment at a much lower salary, we would still want to pay judges well to ensure their financial independence - for our sake, not theirs."**

Again, with the important observation that quantifying what is appropriate in all the circumstances is very difficult, the principles were not in dispute between the participants.

6.2 Attracting Candidates

The participants agreed that compensation for Manitoba's Judges must be at a level sufficient to permit the attraction and retention of strong candidates

for the bench. Again, in the words of Professor Friedland:

> **"One wants salaries to be high enough, when combined with generous pensions, to attract a good pool of excellent candidates."**

We were provided with extracts from a number of reports of committees such as ours, all of which echoed the same theme. The principle is simple to articulate; applying it in practice is far more difficult.

Compensation for federally appointed judges is significantly greater than for provincially appointed judges in this province, and that discrepancy disturbs the Judges. The concern the Judges expressed was that the "better" candidates are more interested in a federal appointment than a provincial one, with the higher salary a major motivation. The Judges said (page 28) it was a "well-known fact that an appointment on the provincial bench is much less attractive than an appointment to the Court of Queen's Bench . . .". The Province observed in its submission that there was no evidence of any difficulty encountered in either obtaining sufficient numbers of qualified candidates or in retaining Judges as a result of compensation issues. It noted that in the dozen or so years during which the JCC process has existed, no Judge has resigned to go into private practice.

6.3 Economic Climate

The Province suggested that our recommendations must result in compensation levels for Judges "reflective of Manitoba economic conditions and the relative compensation levels of Manitoba workers". The Judges said (page 32) that our recommendations must "reflect(s) the reality that fair and reasonable compensation cannot be determined in a vacuum". Nevertheless, the Judges argued that the two principles articulated in sections 6.1 and 6.2 of this Report should override any current economic considerations. They argued that in the time frame under consideration, in Manitoba "the economy should be considered a neutral factor". Both participants provided considerable information on the current state of and projections regarding the Manitoba economy. As a general principle we accept that our recommendations must reflect the conditions in which Judges live and operate, which include the economic conditions in this province.

6.4 Other

Both participants suggested that there were other "principles" to consider. These are, in our view, more in the nature of assertions on the part of one participant or the other, rather than recognizable and accepted principles underlying the issues

before us. We have taken into account the various assertions put forward, whether or not we recognized them as accepted principles and whether or not they ultimately influenced our recommendations.

7. Retroactivity

The issue of retroactivity is a significant one for this JCC. Some background is required.

As noted above, the Act which governs JCC4 stipulates that the Province is to constitute a JCC "once every two years". As is apparent from our summary in section 2.1, the Province did not appoint JCCs in accordance with that legislative requirement. The most recently appointed JCC, before this one, was appointed in January, 1997 and issued its report in June, 1998. We will quote (page 15) the salary recommendations of JCC3, since they are relevant to this issue of retroactivity:

> "**. . . we recommend an annual salary of $105,000 effective April 1, 1997 and $112,000 effective April 1, 1998.**" (Emphasis added)

Similar words were used in relation to the recommendations for annual salaries for the Chief Judge and the Associate Chief Judges.

Clearly JCC3 intended its first salary recommendations to be effective from April 1, 1997 to March 31, 1998, and its second salary recommendations to be effective from April 1, 1998 to March 31, 1999. When the standing committee of the legislature dealt with the Report, it accepted the salary recommendations in the following terms (Schedule A, quoted in the judgment of Mr. Justice Wright):

> **"That effective April 1, 1997 salaries for Provincial Court Judges be increased to $105,000 per annum . . . and that effective April 1, 1998, salaries be further increased to $112,000 per annum . . ."**

The recommendations of JCC3 used the word "annual", which was not replicated when the standing committee purported to accept the particular recommendations.

The Province took the position before us (page 35) "that any compensation changes should commence no earlier than the date of appointment of this committee (i.e., 2001)." As noted above, the Order in Council constituting JCC4 was enacted on February 21, 2001. The Province, therefore, took the position that this JCC had jurisdiction to make recommendations regarding compensation only relating to the period commencing February 21, 2001 and terminating March 31, 2002. For the purposes of our discussion in this section on retroactivity, we will refer to this time period as "Period A". The Judges agreed that our jurisdiction in respect of all recommendations ends as of March 31, 2002, since according to Bill 46 another

committee is to be appointed to make recommendations commencing as of April 1, 2002. Both participants, therefore, concur that we have jurisdiction to make recommendations in respect of Period A.

The Province in its response elaborated upon its view of our authority to make recommendations for any time before Period A. It said (page 15):

> **". . . any change to compensation that adjusts the compensation including pay or pension credits for any periods of time prior to the period for which this board has jurisdiction would be an error. If this JCC were to award salary or other compensation improvements for periods prior to its appointment, it would effectively be interfering with a decision of a previous JCC. It would be providing an increase in compensation . . . for a period of time over which it has no jurisdiction. JCC3 . . . made an award respecting service [this related to pensions] prior to 1992. Manitoba did not challenge that decision in the courts. However, this JCC should not assume that the decision of that JCC or the court ruling was acceptable to Manitoba . . . all three previous JCC's in Manitoba have made recommendations for a two year period only . . ."**

Importantly, the last sentence clearly confirms that the Province agrees that JCC3 made its recommendations for "a two year period only", ending March 31, 1999.

The Judges said (pages 62 et seq) that because the Province had neglected to

appoint JCCs in accordance with the legislation it should not be permitted to obtain the benefit of ignoring "its own legislation". There is no limit on jurisdiction contained in the current legislation, said the Judges, which only deals with the appointment of a JCC each two years but "is silent with respect to their jurisdiction". The Judges argued that we ought to make recommendations commencing January 1, 1999, "given that no JCC has been appointed with jurisdiction to cover the year 1999".

We have given very careful consideration to the submissions of the parties on this particular issue. In our view, this JCC has authority to make recommendations not only for Period A but also for the period commencing April 1, 1999 to February 20, 2001 (which in this section we will call Period B).

No authority was given to us dealing with the question of retroactivity. We observe, however, that the judgment of Mr. Justice Wright is fully consistent with our decision. In the case before him, the Judges had challenged the Province's rejection of a number of recommendations of JCC3, one of which related to pensions. Among the "reasons" given by the standing committee for the rejection of the pension recommendations was (Court of Queen's Bench decision, page 7):

"The recommendation of the Judicial Compensation Committee to

provide judges with improved pension credits for service prior to July 1, 1992 would effectively increase judges' compensation for their services at that time. This is not a period during which judges' compensation was under review by this committee."

In dealing with the standing committee's rejection of the pension recommendations, Mr. Justice Wright said (pages 31 et seq) that the reasons of the standing committee were not "rational responses in accordance with the standards the law now requires". He said (page 33):

"The thrust of para. (c) is the argument that improved pension credits for service prior to July 1, 1992 would effectively increase judges' compensation for service at that time and, therefore, the committee had no jurisdiction. In my opinion, this legal objection is not correct. The JCC was charged with the responsibility of making recommendations relative to the state of judicial compensation, at the time of its review. It was perfectly legitimate for the committee to examine the then existing situation of judges whose benefits from the supplementary pension were not particularly significant, and to recommend improvements. The reason advanced in para. (c), therefore, is not valid."

It is important to observe that Bill 46 contains express provisions regarding the time period for which each JCC subsequent to this one is to report, whereas in the legislation which governs us, no temporal provisions are expressed or, in our view, reasonably implied. The Order in Council appointing us contains no reference whatsoever to any time period limitations. JCC1 clearly took the position that it could

make retroactive recommendations, as it did so. The next two JCC's similarly made retroactive recommendations. Mr. Justice Wright, in the only judicial interpretation relating to any Manitoba JCC, clearly accepted the authority of JCC3 to make retroactive recommendations.

Among other authorities that could be referred to, we note the observations of the British Columbia Court of Appeal in **Re Eurocan Pulp & Paper Co. Ltd. and British Columbia Energy Commission** 87 D.L.R. (3rd) 727 (1978) (approbated by the Supreme Court of Canada in **Nova v Amoco Canada** (1981) 2 S.C.R. 437) at 731:

> **"... the commission [British Columbia Energy Commission] would have jurisdiction to entertain a complaint that existing rates in effect and collected are unjust or insufficient . . . it would clearly have jurisdiction to correct the injustice or the insufficiency. There is nothing to lead one to the conclusion that the legislature intended that the commission could only act in this respect prospectively."**

While the context and facts here are different, the principle articulated that a statutory body has the necessary authority (absent contrary provisions in the legislation) to consider matters and provide a remedy as of an earlier date, is applicable to this JCC.

We are satisfied that we have legal authority to make recommendations with retroactive effect. The next question is whether we should exercise this authority, and on this question we think the answer is clear. We start with the dicta of the Supreme Court of Canada (paragraph 133) that:

> **"any . . . freezes in judicial remuneration require prior recourse to a special process . . . governments are constitutionally bound to go through the commission process . . . Freezes of this nature [judicial remuneration] secured without going through the commission process are unconstitutional. The commission must convene to consider and report on the proposed . . . freeze . . .".**

The Supreme Court has explained in clear and unambiguous terms that if a government proposes to freeze judicial compensation it can only do so legally by first activating and observing the JCC process. Otherwise, any freeze is unconstitutional (para. 224):

> **"The unconstitutionality . . . arises from the fact that the government ignored the JCC process."**

It is clear that the recommendations of JCC3, adopted by the Province, implemented annual changes in the compensation of the Judges. While the Province did not repeat the word "annual" in its resolution, the recommendations are clear and unambiguous, and the Province adopted those particular recommendations without

change. Accordingly, the Province gave legal effect to two annual increases in the compensation of Judges, the last of which ended as of March 31, 1999. The Province agrees with this view, as noted above (Province response, page 15).

If we were to accede to the Province's submission that we lack jurisdiction in respect of Period B, we would be giving effect to what the Supreme Court has said is unconstitutional, namely, a freeze in judicial compensation for that period without prior JCC consideration. There is a large time period (April 1, 1999 to February 20, 2001) during which, if the Province's position were to be sustained, the effect would be the continuation of the 1998-99 levels, and thus a freeze of compensation, without a JCC having considered that time period. This would not be the case, of course, had a JCC been appointed every two years, and had each JCC been directed to deal with a particular two year period. By declining to consider and, if appropriate, make a recommendation in respect of Period B, we would be giving effect to such unconstitutionality.

It may be, of course, that when we examine Period B we would recommend that there be no change in judicial compensation for all or part of that period. Should the Province accept that recommendation then the effect would be a constitutionally mandated freeze. Should we recommend that there be changes in judicial

compensation for Period B and should the Province, applying the standards set out in the Supreme Court decision, reject that recommendation and maintain the status quo, again there would be a constitutionally mandated freeze. In either case, we understand the Supreme Court decision as requiring the prior consideration of a JCC for periods when otherwise an unconstitutional freeze would result.

The Province argued that if we were to deal with Period B we would be "effectively interfering with the decision" of JCC3 (yet, as noted, it acknowledges that JCC3 made recommendations for two years only). It is not disputed that JCC3 is now "functus officio", and there was no suggestion that JCC3 would (or could) be revived to deal with any time period after March 31, 1999 and prior to our Order in Council. We are the only JCC which can deal with that period and avoid the unconstitutional freezing of salaries which would result from accepting the Province's submission.

Committees such as this must operate within the parameters established by their governing instruments, in this case, the Act and the Order in Council (see, e.g., **Dixon v Canada (Somalia Inquiry Commission)** (1997), 2 ADMINLR (3d) 306 (FCA)). But the Act and the Order in Council are both silent on the issue of time periods regarding which we may report (in contrast to Bill 46 which defines clear

time periods). Given the unconstitutionality of a freeze without prior reference to a JCC and the absence of any words of limitation in the governing instruments, it is clear to us that we must consider Period B.

Independence of the judiciary is a fundamental principle which underlies the process in which we are now engaged. An essential element of that independence is that the Judges are precluded from negotiating with the Province for their compensation and benefits. Making recommendations after the date of our appointment, as we do now, but in part with retroactive effect, i.e., preceding the date of our appointment, is legally permissible and within our authority, and consistent with the Supreme Court decision. We view it as inherent in our task to ensure, so far as we are able, that judicial independence is maintained and, consistent with that, we think it obligatory for us to consider the time period preceding our appointment and following the period dealt with by the previous JCC (i.e., Period B).

8. Salaries

8.1 The Manitoba Provincial Judges' Association Request

Briefly put, the Judges argued that their salaries should be based on "relative parity" with their federally and provincially appointed counterparts in other

jurisdictions. The Judges argued that salaries across the country should be "relatively equal" regardless of whether judges sit in provincial or superior courts. This would be consistent, they said, with the principle of a strong and independent judiciary and the ability to attract the best candidates.

The Judges argued that the work of trial judges, whether in a superior or a provincial court, is quite similar, and they went into considerable detail on this point. They argued that the salary and pension differential between federally appointed judges and provincial judges is a significant deterrent to attracting the best candidates to the provincial court.

The Judges argued the principles of judicial independence and said that this JCC should recognize and rectify the "enormous disparity" between the salaries of federally appointed judges and the Judges. We provide details of these salaries shortly. The Judges argued that there was no difference in the importance or value of the work they did as compared to that of judges of the Court of Queen's Bench. They argued, among other matters, that earnings of lawyers in private practice are significantly higher than the earnings of Judges which again is a deterrent factor to appointment. They said (page 29):

"It is well known that one is likely to earn more as a lawyer than

as a judge."

They said that we need not make any precise findings regarding private lawyers' incomes but simply take into account that they are significantly in excess of judicial earnings.

On the Manitoba economy the Judges reminded us that there are only 40 Judges in the group under consideration, and that, as noted earlier, at best the state of the economy is a neutral factor. The uncertainty triggered by the tragedy on September 11, 2001 could at most only impact the period from that date to the end of March, 2002. They provided a number of statistics to show that the provincial economy was strong in 1999 and in 2000. They referred to economic forecasts and other predictions and said that the consensus was that the Manitoba economy is strong and is likely to grow.

The Supreme Court had rejected the use of formulas, and said that a tribunal such as this should consider objective criteria. The Judges made reference to Bill 46 which, while not applicable to this JCC, nevertheless sets forth a number of factors which will be considered in the future, and which, both policy and principle would suggest, should not be irrelevant now. Those factors are included in the summary of the legislation above.

Much of the Judges' argument on salaries related to a discussion on judicial compensation in this province as compared to other jurisdictions. The thrust of the Judges' argument was that they are the lowest paid in relation to their counterparts "by a hefty margin". They made specific reference to the salaries in Saskatchewan, New Brunswick and Nova Scotia (which provinces we will refer to as the "Three Provinces"), because the provisions of Bill 46 mandate a consideration of such salaries by the next JCC. The Judges referred to the reports of other compensation tribunals and in particular the influence on the other JCCs of a comparison of other judicial salaries.

The Judges argued that a consideration of the salaries of federally appointed judges as a proper comparable would be appropriate. They rejected any comparison with the salaries of deputy ministers and also a number of the other propositions suggested by the Province.

After reviewing the details of the salaries in the federal and other provincial jurisdictions, the Judges proposed, in specific terms, that judicial salaries in this province should be calculated with specific reference to other judicial salaries in Canada and, in particular, to the federal salaries. The concept of relative parity meant simply that the Judges should receive an amount calculated with reference to other

judicial salaries (page 67):

> **"While there is a degree of arbitrariness in establishing the appropriate boundaries for permissible diversity, it is strongly argued that the differential in judicial salaries throughout this country should be varying by no more than ideally ten percent, and at a maximum, 20 percent."**

The Judges provided us with tables indicating the Court of Queen's Bench salaries and amounts calculated with reference to 90% thereof, 80% thereof and 75% thereof.

8.2 Province's Response

The Province suggested that our recommendations on salary be based on the concept of total compensation, which we described above. It suggested that our salary recommendations take into account Manitoba's economic circumstances and the relative compensation levels of Manitoba workers. This was on the basis that Judges' compensation "must be reflective of the environment within which they function and must bear some reasonable relationship to the citizens they serve".

The Province referred to the Manitoba legislation (1995) requiring balanced budgets in this province and noted that affordability was a relevant factor. It

commented on the Province's expenditures and other economic circumstances. It noted that Manitobans enjoy a relatively low cost of living and, for higher income earners, the fourth lowest marginal income tax rate in the country. It made reference to recent settlements in wage disputes in the public sector which were in the 2.3% range.

The Province argued that a proper comparable for the position of Chief Judge was a senior Deputy Minister in the Manitoba civil service (other Judges including the Associate Chief Judges would have their salaries determined by reference to the salary of the Chief Judge). We will discuss this comparison in more detail below. In summary, however, the Province argued that there has been a relationship between the level of compensation of the Chief Judge and senior Deputy Ministers which should be a factor in determining the compensation for Judges. It focused in particular on the position of Deputy Attorney General, and essentially argued that, having in mind the "breadth, depth and scope of the managerial responsibilities of the Deputy Attorney General, his or her level of compensation should exceed that of the Chief Judge". Taking into account pension contributions, the Province said that the overall compensation received by the Chief Judge is now "significantly in excess" of that of the Deputy Attorney General.

The Province said that JCC3 made recommendations for 1997 and 1998. The Province said that the Judges:

> **"appear to accept that the decision made at that time resulted in reasonable salaries, pension and benefits having regard for all factors. Manitoba takes the position that the JCC should examine the relationships that existed at that point in time and then focus on the way in which those relationships have changed since that time."**

The Province argued that this was a valid framework of analysis.

The Province noted that JCC3 recommended salaries at the level of 63.6% of the federal judiciary salaries and that JCC1 recommended salaries in the range of 61.5% to 64.7% of those salaries. It also noted that JCC1 rejected the concept of relative parity with the federal judiciary. The Province said that Deputy Ministers' compensation was more relevant as a comparison than the earnings of fee for service lawyers in the private bar.

8.3 Salary History

Until the establishment of the first JCC salary changes for Judges occurred by Order in Council, without any external review or recommendation process. The

Province said, and this was not disputed, that Judges' salaries had often been equated to a step in the Senior Official 6 or 7 civil service salary scale. Typically these levels were also used for senior Deputy Ministers. Since the increase in 1989, Judges' salaries increased by 3% in 1993 and 2.3% in 1995. In 1992 the Judges received an improvement to their pension plan. The recommendations of JCC3 resulted in increases of 9% in 1997 and 7% in 1998. The Province said that in the 14 years from 1986 to 2000, Judges' salaries have risen from $72,660 to $112,000 (the April, 1998 recommendation of JCC3). The percentage increase over that time period aggregated 54.1%.

We now reproduce a table (TABLE 1) with explanatory notes provided to us by the Province giving the salaries of Judges, the Associate Chief Judges and the Chief Judge in the years 1986 to 2000. The 1999 and 2000 numbers in this table are the same as the salary recommendation of JCC3 for 1998, which was adopted by the Province.

TABLE 1
MANITOBA PROVINCIAL JUDGES' SALARIES
1986 - 2000

	Judges	Associate Chief Judge	Chief Judge
1986	72,660	74,660	79,660
1987 (1)	74,309	76,309	81,309
1987 (2)	76,541	78,541	83,541
1988 (1)	79,491	81,491	86,491
1988 (2)	81,874	83,874	88,874
1989 (1)	85,090	87,090	92,090
1989 (2)	88,607	90,607	95,607
1991	91,274	93,279	98,272
1992 (3)	91,274	93,279	98,272
1993	94,017	96,017	101,017
1995	96,173	98,173	103,173
1996	96,173	98,173	103,173
1997 (3)	105,000	108,000	112,000
1998	112,000	115,000	122,000
1999	112,000	115,000	122,000
2000	112,000	115,000	122,000

(1) Increase resulting from movement to a higher step in the salary range (i.e., based on civil service scale).

(2) Increase resulting from an overall increase to the salary range (i.e., civil service).

(3) Introduction of Judges' supplementary pension plan (pension improvement not reflected in salaries).

8.4 Suggested Comparables and Other Factors

(a) Other Provincial Court Judges

We think that of all the factors put before us for consideration the most relevant and important is the compensation received by other provincial court judges in this country. Of particular significance is the compensation received by judges in provinces of roughly comparable size and economic circumstances to Manitoba. This conclusion is consistent with and is confirmed by the past JCCs , which essentially based their recommendations on this comparable. It is further supported by the policy decision of the Manitoba government set out in Bill 46 coming into effect April 1 of this year. Future JCCs will have to consider "judicial compensation packages in other jurisdictions in Canada" and how they compare to the "compensation package paid to judges in Manitoba". Moreover, future JCCs "must set forth information with respect to salaries of judges in New Brunswick, Nova Scotia and Saskatchewan" in their Reports. Bill 46 further provides that certain salary recommendations made by future JCCs will be binding on the Province and the Judges, depending upon the relationship between those recommendations and the average of salaries of judges in the Three Provinces.

This new legislation is not binding on us, and Bill 46 does not apply to this

JCC. Nevertheless, we take note of the policy decision by the Province that for future JCCs salaries of other judges (as part of the "compensation package") and in particular judges in the Three Provinces, are of considerable relevance as comparables. However, although salaries paid to other provincially appointed judges are relevant as comparables, looking at the broad range of salaries across the country we conclude that they do not offer any obvious answers. The fact is that across Canada there is a wide range of judicial salaries.

From the information provided to us we have information on salaries in a number of jurisdictions. It must be noted, however, that some current information relates to salaries that have been recommended by a JCC but not necessarily accepted by a provincial legislature. We next reproduce a table (TABLE 2) provided to us by the Judges and titled "Judicial Salaries by Jurisdiction". This table includes all ten provinces, two territories and the federal jurisdiction.

TABLE 2

Judicial Salaries by Jurisdiction

Year	BC	ALTA	SASK	MB	ON	QUE	NB	NS	PEI	NFLD	NWT	YKN	QB (Fed)
2003	$ 161,250	JCC 2003	JCC 2002	JCC 2002	JCC 2003	$ 184,000	$ 169,805	JCC 2001	unknown	$ 159,181	unknown	JCC 2001	••••
2002	$ 158,000	$ 170,000	JCC 2002	JCC 2002	JCC 2001	$ 182,000	$ 161,709	JCC 2001	unknown	$ 156,060	unknown	JCC 2001	••••
2001 Rec*			JCC 2002	JCC 2001	JCC 2001	$ 180,000	$ 154,018	JCC 2001	unknown	$ 153,000	unknown	JCC 2001	
2001	$ 155,000	$ 170,000	$ 143,000	$ 112,000	$ 175,999	$ 137,333	$ 141,202	$ 144,000	$ 144,314	$ 112,000	$ 158,000	$ 141,702	$ 204,400
2000	$ 144,000	$ 170,000	$ 143,000	$ 112,000	$ 171,210	$ 137,333	$ 141,202	$ 137,000	$ 136,461	$ 112,000	$ 158,000	$ 138,246	$ 198,000
1999	$ 139,000	$ 152,000	$ 112,961	$ 112,000	$ 161,440	$ 134,640	$ 125,762	$ 130,000	$ 131,036	$ 112,000	$ 154,000	$ 135,270	$ 178,806
1998	$ 134,000	$ 142,000	$ 112,961	$ 112,000	$ 152,550	$ 118,031	$ 125,000	$ 124,000	$ 112,934	$ 112,000	$ 143,881	$ 135,000	$ 176,000
1997	$ 118,402	$ 113,984	$ 96,173	$ 105,000	$ 125,120	$ 113,491	$ 100,412	$ 102,000	$ 107,635	$ 112,000	$ 128,133	$ 112,179	$ 166,000
1996	$ 118,402	$ 113,984	$ 94,556	$ 94,017	$ 124,250	$ 113,491	$ 98,936	$ 99,037	$ 106,298	$ 112,000	$ 128,133	$ 112,179	$ 158,929
1995	$ 118,402	$ 113,984	$ 94,556	$ 94,017	$ 124,250	$ 113,491	$ 97,474	$ 99,037	$ 98,680	$ 112,000	$ 119,613	$ 112,179	$ 158,929
1994	$ 118,402	$ 113,984	$ 94,556	$ 90,444	$ 124,250	$ 113,491	$ 97,474	$ 99,037	$ 98,248	$ 112,000	$ 119,613	$ 112,179	$ 158,929

	indicates that the salary shown is to be reviewed by a JCC (therefore subject to change)
	indicates that the salary shown has been recommended by a JCC but is as yet unconfirmed

2001 Rec* shows salaries that were recommended by a JCC for 2001, but which have not been confirmed.

BC: April 2001 report accepted in entirety

ALTA: 2000 Commission proceeded by way of joint submission and was in respect of April 1, 2000- March 31, 2003

Sask: JCC to be held in 2002 which will determine figure for 2001-2003

MB: this JCC will determine salary for 2000 and 2001, JCC in 2002 will determine salary for 2002 and 2003

ON: 2001 JCC report pending

QUE: September 2001 JCC report recommended for 2001-2003 (yet to be implemented)

NB: April 2001 is yet to be implemented

NS: 1999 JCC had jurisdiction for 1999, 2000, and 2001. Next JCC is 2001 November.

PEI: 2001 JCC had jurisdiction for 2001, 2002, and 2003. Next JCC is 2004.

Nfld: Sept 2001 JCC report recommended for 1996-2003 (yet to be implemented -to be introduced in House on Nov.14, 2001)
Recommendations for other years were: 1996- $114,500; 1997- $117,000; 1998- $134,800; 1999- $142,400; 2000- $150,000

NWT 2001 JCC had jurisdiction for 2001 and 2002. Next JCC is 2003

YK: 1998 JCC was binding by agreement for years 1998, 1999 and 2000. Next JCC December 2001.

QB: 2001 Commission implemented for 2001, 2002, 2003.

•••• figures depend on annual adjustment -see s.25(1) of the Judges Act.

Note: The information in this chart and the bar graphs which follow was compiled using statistics from recent reports, as well as the CAPCJ Compensation Surveys for the years 2001, 2000 and 1996 which are attached as Exhibits 56, 57 and 58 respectively.

We sought and received updated information on salaries after the conclusion of our hearings. The information regarding Saskatchewan has not changed. The information regarding New Brunswick has changed. For the year 2000, as TABLE 2 indicates, in New Brunswick the salary of provincial judges was $141,202. For 2001, the tribunal in New Brunswick had recommended a salary of $154,018, but the government fixed a salary of $144,122. For the next two years, as TABLE 2 indicates, the tribunal recommended salaries of $161,709 and $169,805 respectively. The government is implementing increases in each of those years in accordance with the Industrial Aggregate Index. We were advised that the New Brunswick government's decision relative to implementation of the tribunal's report is the subject of a court challenge by the Provincial Court Judges Association of New Brunswick that was filed in early January, 2002.

It will be noted from TABLE 2 that the Newfoundland numbers were unchanged from 1994 through 2001, and then for the years 2001, 2002, and 2003 there were increases based on a tribunal's recommendations. We have been advised that the Newfoundland tribunal has recommended salary increases as follows:

1996	$114,500
1997	117,000
1998	134,800
1999	142,400
2000	150,000
2001	153,000

2002	156,060
2003	159,181

We were advised that the Newfoundland government's response to these recommendations is as follows:

1996	$114,500
1997	117,000
1998	123,400
1999	130,300
2000	137,200
2001	139,900
2002	142,700
2003	145,600

We were advised by the Judges that the Newfoundland judges are currently reviewing the government's decision, and may challenge it in the courts.

In Quebec the 2001 recommendation was $180,000, increasing in each of the next two years by $2,000. The government has applied for 2001 an 8% increase over the previous (2000) salary of $137,333, such that in 2001 the salary will be $148,319. Over the next two years it will rise respectively to $152,027 and then $155,069. The Judges told us that the Quebec judges are reviewing the government's actions in relation to the possibility of a court challenge.

It is clear that, even with the uncertainty in a few provinces because of possible or actual court challenges, the salaries of Manitoba Judges, if not materially changed in 1999, 2000 and 2001, would be below, and in some cases significantly below, those in every other provincial jurisdiction. That is a very important factor for us to take into account.

(b) **Federally Appointed Judges**

An examination of TABLE 2 will reveal that the salaries of Court of Queen's Bench Judges in Manitoba, which we use as the proxy for federally appointed judges, have been higher than the compensation of any provincial court judges in the country in each of the years since 1994. We understand that such disparity is of long standing. The Judges argued that there was no rational basis for such disparity. Having considered the argument of the Judges on relative parity to federally appointed judges, we conclude that we cannot accept that approach.

We agree that the salaries and other compensation of federally appointed judges are relevant, and a factor to consider, but they are not determinative. They are relevant mainly because in this province the pool of candidates for the provincial bench is essentially the same as that for the federally appointed judges, namely,

The Judges suggested that, given that challenges might be launched in Newfoundland and Quebec, and that one has been launched in New Brunswick, it would be inappropriate for us to consider these governmental responses as indicative of what will ultimately be paid in those jurisdictions, and they should be regarded only as minimums.

We recognize that some of the factors which were put before us for consideration are relatively quantifiable, such as increases in the cost of living. Others are inherently incapable of quantification, such as the need to ensure that Judges' salaries remain "adequate". It is in relation to such latter factors that the salaries paid to other provincial judges become particularly relevant. Each province takes into account its particular circumstances but, apart from differences in local factors, which in some cases are not great, there is logic to the concept of relative parity among provincially appointed judges. This is so because, based on the information we have been given, the work of provincially appointed judges across the country is roughly similar in nature. If we look, as we have done, at salaries across the country for provincially appointed judges, we understand what salary levels different provinces consider reasonable to ensure, among other matters, the level of financial security inherent in judicial independence.

Manitoba lawyers. The number of years of qualification at the bar is higher for the federal bench, but the pool remains a limited one. To some extent, therefore, the provincial bench competes with the federal bench for its candidates, and if the compensation on an overall basis is significantly different, that will be one factor militating in favour of certain lawyers seeking appointment to the federal bench and not to the provincial bench.

There are, however, good reasons not to focus too much on the federal bench. While we think the gap between the provincial judges and the federal judges should not be as large as it now is (in 2001 the federal salary is $204,400 and, prior to this Report, the provincial salary is $112,000, or a gap of $92,000), we nevertheless find justification for a measurable gap (as do the Judges themselves, based on their submission; the matter is one only of degree, not principle). There are practical considerations that militate against too close a comparison. These have been acknowledged by previous JCCs. For example, JCC1 said (page 16):

> **"Salary levels of federally appointed judges are set nationally. Accordingly, in order to attract qualified candidates in Toronto and Montreal, salaries must be far in excess of what would be necessary to attract qualified candidates residing for example, in a small centre in New Brunswick or Saskatchewan."**

There are some important differences in the nature of the Court of Queen's

Bench and the Provincial Court. The Court of Queen's Bench, being a superior court, is a court of inherent jurisdiction. The Provincial Court, not being a superior court, is a court of limited jurisdiction which derives its jurisdiction exclusively from statute. The Province asserted that the criminal matters dealt with by the Court of Queen's Bench "tend to involve the more serious charges and the more complex cases including the complexities associated with jury trials". Without in any way diminishing the significance of the work done by or the cases heard by the Provincial Court, we think the Province's submission on this point has validity.

An indication of the nature of the work is reflected in written decisions (a matter which is also relevant when we consider the Masters). The Province told us that in 1999 there were 22 written judgments issued by the Judges of the Provincial Court and in 2000 that number became 21. The Province said that the Court of Queen's Bench Judges "frequently" issue written decisions; the Judges did not challenge that assertion.

While the Judges disputed the significance of a hierarchy in the court system, in which some judges sit in appeal of the decisions of other judges, it is not disputed that such a hierarchy exists. It is another matter whether such a hierarchy justifies salary differences and, if so, to what extent. Professor Peter Russell observed

(Judges' submission, page 53) that if a hierarchy of courts becomes a hierarchy of salaries the risk is that the quality of justice will bear a similar hierarchical relationship. The Judges noted, correctly, that there is no necessary correlation between a jurisdictional hierarchy and a salary hierarchy, as exemplified by the fact that the Judges of the two Manitoba superior courts receive identical compensation, notwithstanding that the judges of the Court of Appeal sit in judgment of the decisions of the Judges of the Court of Queen's Bench.

On this latter point we note that, in its report of May 31, 2000, submitted to the Minister of Justice of Canada, the federal Judicial Compensation and Benefits Commission said (page 49) that it was urged by the appellate judges of six courts of appeal in Canada including the Court of Appeal of Manitoba to recommend a salary differential between appellate and trial court judges. The main arguments advanced in support of different salaries for the two superior courts within the provinces included arguments that:

> **"when regard is had to the hierarchical organization of the Canadian judicial system, it is clear that salary differentials already exist for all levels of courts, save that no increased salary is paid to judges in the appellate courts."**

This argument noted salary differentials between judges in the Supreme Court

of Canada and other courts, between judges on the trial courts in each province and provincial court judges and between justices of the peace and commissioners and judges at various levels. Many of these arguments, said the commissioners, were "compelling". The Commission decided that a more in-depth review and evaluation of information was needed than it had received and, accordingly, it made no decision on that particular issue.

The Manitoba legislature has, by Bill 46, linked the Judges with the Masters in terms of compensation from June 6, 2001 onwards. As the Province correctly argued, the Masters have never been "regarded as being at a level of 'relative parity' with Queen's Bench Judges", thus re-enforcing the appropriateness of no direct linkage between Provincial Court Judges and Queen's Bench Judges.

The Judges argued that the federal judicial salaries should be among the most important factors we consider. We regard the federal salaries as relevant, and as one of a number of factors, but do not single them out as being of paramount importance.

(c) **Deputy Ministers**

The Province suggested that compensation of senior Deputy Ministers within

the Manitoba civil service was a relevant factor in determining Judges' compensation. It focused on the position of Deputy Attorney General, responsible for a large department with a large number of staff and argued that the Deputy Attorney General's compensation ought to exceed that of the Chief Judge. At the top of the scale in 2000/01, the Deputy Attorney General received $123,599. In the next two years the salary will be $126,396 and $129,309. The Province also pointed out that the Judges have a more attractive pension arrangement than the Deputy Attorney General and other civil servants which was a factor, it said, that we should take into account. Further, the Judges enjoy significant security of tenure. They keep office during good behaviour and are not required to retire at any particular age. The Deputy Attorney General, on the other hand, holds office at the pleasure of the Lieutenant Governor in Council and is inherently subject to less security of tenure.

In recent years the Chief Judge's salary as a percent of the Deputy Attorney General's salary has been as follows:

1995/96	88.9%
1996/97	88.9%
1997/98	95.5%
1998/99	103.0%
1999/2000	101.0% (Chief Judge at 1998/99 level)
2000/2001	98.7% (Chief Judge at 1998/99 level)

The Province noted that the Chief Judge's salary has risen to approximate parity with that of the Deputy Attorney General as a result of the JCC process and that when pension improvements are taken into account the total compensation received by the Chief Judge is "significantly in excess" of that of the Deputy Attorney General.

The Ontario JCC chaired by Dean Beck said (page 44) that salaries paid to the senior civil servants in Ontario were a "relevant factor" to take into account. The federal Commission in its recent report devoted some considerable space to comparisons with senior Deputy Ministers, taking the view that compensation of senior Deputy Ministers was relevant in considering judicial compensation. It said that the Deputy Minister 3 level should not be determinative, but was nevertheless an appropriate and useful comparator because of the relevance of (page 31) "the maintenance of a relationship between judges' salaries and the remuneration of those senior federal public servants whose skills, experience and levels of responsibilities most closely parallel those of the judiciary".

It must be borne in mind that at the federal level there are no possible Canadian judicial comparators except provincial judges, whose salary levels are historically lower than the federally appointed judges, and who are not regarded as

appropriate comparators. For that reason the federal Commission considers salary levels of, for example, judges in other countries and incomes of private practitioners. The salary of a Deputy Minister has far greater relevance federally than it might in Manitoba.

The Judges firmly rejected the validity of any comparison with salaries of Deputy Ministers. They argued that this was simply "a relic from another era" and was based on the notion of absolute government control over the compensation of the persons it pays. The Judges pointed out that a number of judicial compensation tribunals had rejected the validity of the comparison. For example, in Ontario in 1988 (Judges, page 56), the Commission noted:

> **"Wholly different imperatives govern the salaries appropriate to each. Deputy Ministers are primarily managers . . . in paying them it is appropriate to provide wide salary ranges and payment based on performance. The function of a provincial court judge, however, is neither administrative nor managerial; thus, it is not truly comparable to that of a Deputy Minister . . ."**

In Manitoba, all previous JCCs have been presented with and have considered the Province's approach attempting to tie the Judges' salaries to those of Deputy Ministers. When JCC1 issued its report in June, 1991, salaries for Judges had been linked to senior civil service salaries for a dozen years. JCC1 said (page 10):

"Obviously we must determine what other occupations can be considered comparable for purposes of establishing appropriate compensation. . . the most compelling comparison is with their counterparts in other jurisdictions.

Senior Civil Servants are often one group that is used as a comparison . . . This comparison draws criticism for a number of reasons . . . the fact is that the functions, duties and responsibilities of the two positions are very different . . .

Ultimately, the unique nature of Judging makes comparisons with other positions of little value; it is other judicial salaries that are really the most relevant guide . . ."

JCC2 (December, 1995) said (page 6):

". . . the [JCC1] logic with respect to salaries is difficult to refute. The work of a Judge is really unique . . ."

Later (page 9) after indicating where a certain judicial salary would relate to a Deputy Minister's salary, JCC2 said:

"This is not to suggest that the work of a judge can be compared to that of the . . . Deputy Minister of Justice. It cannot . . . The position and functions of a judge are not comparable to a senior executive management position in . . . the public sector . . . The only valid comparison between Judges and Deputy Ministers is that both are paid by the taxpayer."

JCC3 agreed that a comparison of the job functions was not possible, and said that the rate of pay of senior civil servants reflects a government's ability to pay as well as the marketplace for senior professionals. We will observe that, as noted below, it reflects also a government's willingness to pay in a situation where negotiating for pay is permissible, unlike with the Judges.

We also note that, when the legislature expressed its will in Bill 46, it mandated for future JCCs a comparison, not with the compensation of senior civil servants, but only with other "judicial compensation packages". This is a compelling statement of Provincial public policy.

Although we are not engaged in an interest arbitration, as we observed earlier, certain elements considered by interest arbitrators have some pertinence here. In this context the type of work performed by the persons under consideration must be taken into account and, where possible, compared to the type of work done by other persons in comparable positions. For that reason, we think that comparison of Judges' compensation with the compensation of other judges, whether provincially or federally appointed, is of far more relevance than a comparison of compensation paid to civil servants. We share the view, which we think is applicable when considering judicial compensation, of Professor Weiler (1988) that:

> **"The relevant comparison . . . is with earnings of people who have essentially the same training and responsibilities but who happen to work in other settings."**

In other words, the best comparators for judges are other judges. The New Brunswick Commission put it bluntly in 1998 when it said (page 12) that "the only true comparison is with other judges".

There is another factor which strikes us as pertinent. The compensation of senior Deputy Ministers is fixed, essentially unilaterally, by the Province. There is no element of third party review, such as this process nor, we suspect, is there usually very much in the way of negotiation between the senior Deputy Ministers and the Province. This reality was noted by the Quebec Court of Appeal in a decision provided to us by the Judges **(Quebec Judges Conference v Quebec, Attorney General** (2000), 196 DLR (4th) 533 at 540):

> **"To base the remuneration of judges necessarily on the remuneration of level 1 government managers would be to upset the constitutional process, because the government completely controls the remuneration of higher level public servants which remuneration is in no manner determined by a constitutional rule . . ."**

The historical relationship between the salary of a Judge and a Deputy

Minister has limitations as a guide to setting judicial compensation. There is no obvious reason why a Judge's earnings should be linked to a Deputy Minister's. It is not disputed that the work of one is completely different from the work of the other. The pool of possible candidates for the two positions is almost completely different. Judges must be lawyers of at least five years standing. Deputies come from government, industry, academia and the professions. The marketplace for senior administrators may be, and probably is, a relevant factor when a government decides what it will pay its Deputies. However, that marketplace is irrelevant to what a Judge should be paid. Ultimately, a Deputy Minister's salary is a reflection of what the government of the day unilaterally determines to pay to its senior administrators. There is no constitutional rule or context that governs, as there is with the Judges.

We have taken into account the Deputy Ministers' salary levels because, like the Judges, they are paid by the provincial government and their salaries are a possible indicator of a government's "ability" to pay. We have, however, concluded that their compensation is not as helpful, as a comparator, as the compensation levels of other judges, including both provincially and federally appointed judges.

(d) **Other Factors**

We have taken into account all information in the submissions provided to us, including the material on Manitoba's economic circumstances, cost of living increases and public sector settlements. No single one of these other factors is absolutely determinative. We agree with JCC3 that the Judges' salaries cannot be determined by considering only factors originating in Manitoba. Were that so, we could not take into account salaries of judges from other jurisdictions and, like the JCCs whose work we have reviewed, and as Bill 46 indicates, we think they are very relevant.

But clearly local economic circumstances are also relevant. Otherwise we could simply look at the comparables from those provinces where the court's jurisdiction is very much like in Manitoba to derive the appropriate salary level. That would give disproportionate value to comparables from provinces where the economy is more buoyant than Manitoba's. Provinces whose economic circumstances resemble those of Manitoba are far better as comparators.

We are cognizant of local economic factors, as well as differences in both revenues and expenditures in different jurisdictions. We are aware, as are most

citizens, that certain costs are lower in this province than the equivalent elsewhere, and that in general, incomes are lower in this province than in certain other jurisdictions. Similarly, certain individual expenditures may be higher, and individual incomes may be higher, than in some other jurisdictions. Manitoba is frequently regarded as at about the median among Canadian jurisdictions in terms of both incomes and expenses.

The information we received on the incomes of private practitioners is almost entirely anecdotal and, for Manitoba, we think there is little reliable data. When the Judges say that it is "well known" that lawyers are likely to earn more than Judges, we do not accept that assertion. Some do, and some do not. The more experienced and successful lawyers have a greater opportunity to do so, but they will incur more obligations and liabilities in realizing on those opportunities (capital, bank loans, leases, staff salaries, libraries, etc.), and they do not have government-funded pension plans. We simply note the undoubted fact that some lawyers will earn more than Judges, but we draw no conclusion from that fact. It is the case that to entice excellent applicants, judicial compensation, taken in its entirety, must be sufficiently attractive, and comparisons with private bar compensation will always be made.

8.5 **Recommendation**

In 1991 JCC1 said the following (page 16):

". . . national or even regional averages that include very large cities such as Toronto or Vancouver, offer little assistance. What does seem most appropriate are comparisons with those jurisdictions where the population base and economic factors are similar to those of Manitoba. These may change over time, but based on the data provided to this committee, Nova Scotia, New Brunswick and Saskatchewan presently are the three provinces with which Manitoba most readily compares. None have (sic) an urban centre of the size of Toronto, Vancouver or Montreal. Their working conditions and cost of living are comparable, and, most significant of all, their ability to pay appears comparable. They fall in the 5 through 7 range in terms of the government's provincial rankings for the various economic indicators which illustrate the economic health of a province."

In JCC2's report the following comments were noted (page 5):

"In their submissions to this committee, the judges indicated that they felt that the average formula approach adopted by the Baizley committee was an 'acceptable approach' for this committee to follow. That is, with respect to salaries, they felt that it would be fair if their salaries reflected the average of the salaries of the provincial judges of Saskatchewan, New Brunswick and Nova Scotia."

The Province had argued before JCC2 a "made in Manitoba" approach and

suggested that an appropriate salary level for Judges could be determined by examining what other Manitobans, such as senior Crown Attorneys, the Deputy Minister of Justice and lawyers in private practice, are paid, and by taking into account other Manitoba earnings data.

JCC2 found the logic of JCC1 "with respect to salaries . . . difficult to refute". It found that only other judges performed similar work and that of all jurisdictions in Canada the Three Provinces were most comparable in terms of size and economic strength. It recommended that Judges' salaries be adjusted to reflect the average of the salaries of provincial court judges in the Three Provinces.

JCC3 expressly considered "the three provinces most similar to Manitoba in terms of population and economic circumstances", namely Saskatchewan, New Brunswick and Nova Scotia. It took into account other relevant considerations, but rejected a total "made in Manitoba" approach. Like other JCCs it considered that salaries of Judges in Manitoba should be comparable to salaries of judges elsewhere in Canada. It concluded with recommendations that "closely reflect the average judicial salaries of the three provinces most similar to Manitoba - Saskatchewan, Nova Scotia and New Brunswick". It did not give full weight to a large increase that had occurred in Nova Scotia in part because that increase seemed out of line with

other provinces, and also because there was evidence that highly qualified lawyers from the private sector in that province had not been in recent years attracted to the court. No evidence had been presented to JCC3 to suggest that salaries in Manitoba had fallen to the level where qualified candidates from private practice had ceased applying for provincial judicial appointments.

JCC3 also recognized that a number of provinces, including New Brunswick, would be likely to announce judicial salary increases in the near future. Its recommendations, it said, put Manitoba judicial salaries "close to those of Saskatchewan judges, equal to those . . . for Newfoundland judges, and more than only those of New Brunswick and Prince Edward Island judges" (where salary increases were expected shortly).

All three previous JCCs considered that the salary levels in the Three Provinces were important factors to consider. We refer again to Bill 46, in which the Province has expressed as a matter of policy the particular relevance of salaries of provincial judges in the Three Provinces. While Bill 46 does not affect this JCC, we recognize the consistency of approach in that all previous JCCs have given, and any future JCCs governed by the new legislation will inevitably give, extremely close consideration to the salary levels in the Three Provinces.

We now set forth a table (TABLE 3) showing the salary levels (including the average) for the judges in the Three Provinces and Manitoba for the years 1997 to 2001. It should be noted that Saskatchewan's salary for 2001 will be determined by the Saskatchewan government following receipt of a Report from a Committee. The Saskatchewan salary for 2001 is shown as the same as the previous year on the basis that no decrease will be recommended. As noted above, a challenge has been launched by the judges in New Brunswick in respect of their 2001 salary level. The 2001 salary level as established by the government is shown, with the recognition that it may ultimately be increased.

TABLE 3

	SK	NB	NS	Three Province Average	MB
1997	$ 96,173	$100,412	$102,000	$ 99,528	$105,000
1998	112,961	125,000	124,000	120,654	112,000
1999	112,961	125,762	130,000	122,908	---------
2000	143,000	141,202	137,000	140,401	---------
2001	143,000	144,120	144,000	143,707	---------

In the Report of JCC3 "full weight" was not given to the significant increase in Nova Scotia salaries from 1997 to 1998 in part because it seemed high in comparison to judicial salary rates in larger, stronger provinces. But it was not high in relation to New Brunswick nor, for example, to the 2000 increase ($30,000) in

Saskatchewan. Table 2 (supra) demonstrates that there have been significant increases in many provinces (Alberta, Ontario, and New Brunswick among them). We see no reason to discount any of the salaries for comparison purposes.

We think it is relevant to compare Manitoba's salaries to the national provincial court average (which itself is somewhat difficult to determine at any point in time because of uncertainties as to whether a committee report will or will not be adopted and because of timing differences). TABLE 4 sets forth the approximate national average judicial salary (excluding the Manitoba and Federal jurisdictions) of nine provinces and two territories, taken from TABLE 2, with the variations thereto earlier referred to, and for ease of comparison also repeats the Three Province averages and the Judges' salaries for 1997 and 1998:

TABLE 4

	National	Three Province Average	Manitoba
1997	$112,230	$ 99,528	$105,000
1998	129,432	120,654	112,000
1999	136,946	122,908	-------
2000	146,696	140,401	-------
2001	151,305	143,707	-------

Had the Federal jurisdiction been included, the National average would have been higher.

There has been no evidence from which we could conclude that judicial salaries are so low that qualified candidates, especially from the private bar, are no longer applying for judicial appointments. Among other information, we were told that between April, 1998 and February, 2001, there were five competitions for judicial appointments. For these competitions there were 198 applications, of which 43 were forwarded to the Attorney General as worthy of appointment. From this and other information we were given we conclude that the salaries are not so low as to be a deterrent to qualified applicants. That by itself, however, does not mean that salaries should not be adjusted.

We are satisfied by an examination of all factors, including other judicial salaries, that material increases in Manitoba judicial salaries are warranted. As of 1998, Manitoba's salaries, together with Newfoundland's, were fixed at $112,000, the lowest in Canada, yet Manitoba's economy ranks on many measurements around the middle range of all the provinces.

The Province provided us with a number of economic indicators on Manitoba's relative economic position. For example, relative to other provinces in 2001 up to the date of the submission of the Province, Manitoba's position was between fifth and ninth based on a number of economic indicators. Average weekly

earnings were eighth. Importantly, on gross domestic product at market price, per capita, Manitoba ranked fifth (Province, Tab 3), behind Alberta, Ontario, Saskatchewan and British Columbia.

One must take into account the fact that, in addition to the other economic indicators noted, the cost for Manitobans, including the Judges, to live in this province is comparatively low. Winnipeg is among the least costly Canadian cities for buying a home, is the least costly Canadian city for owning and operating a vehicle, and (based on certain family assumptions) has the second lowest utility costs in the country. Manitoba has the fourth lowest marginal income tax rates for higher income earners, and the third lowest sales tax level in Canada. No health care premiums are presently levied on residents of this Province. These, among others, are factors we have considered. The economic circumstances of Manitoba have constrained us, as they should, to ensure that our salary recommendation takes into account, as it does, this Province's situation.

Looking at the economic indicators and facts we are satisfied that the Province can sustain the effect of all the recommendations in this Report. Implementing the recommendations is within the Province's "ability to pay".

In coming to our salary recommendations we have taken into account the other recommendations in this Report and particularly the recommendations dealing with pensions. Our entire Report and recommendations are premised on a total compensation model and, were it not for our pension recommendations, our salary recommendations would be higher.

We recommend the following annual salaries for Judges of the Provincial Court for the years commencing April 1 in the year indicated, and ending March 31 in the subsequent year:

1999	**$122,000**
2000	**133,000**
2001	**144,000**

In each of the three years we recommend that the salary of Associate Chief Judges be $3,000 higher than the salary indicated, and that the salary of the Chief Judge be $10,000 higher than the salary indicated.

In 1999, the increase on a Judge's salary is 8.93%, in 2000 it is 9.02% and in 2001 it is 8.27%. These increases, bringing the Judges into proximity with the appropriate comparables in the judicial world, which we think must be done, will be

both in absolute dollar terms and in percentage terms larger than those typically realized by workers in the Manitoba public sector (and also greater than C.P.I. increases). That, in itself, is an insufficient reason to disregard the appropriate comparables. If we were not to pay close heed to the Three Provinces, we would be the only JCC in Manitoba that had not done so and, bearing in mind the new legislation, our example would not likely be followed in the future. Moreover, although a formulaic approach is not appropriate, great weight must be given to a consideration of judicial salaries in other, especially closely comparable, jurisdictions. We are satisfied that, for both empirical and public policy reasons, as well as reasons of fairness and equity in relation to proper comparables, and having regard to our recommendations on pensions, the salary levels over the three year period of our recommendations should be fixed bearing in mind the salaries in the Three Provinces.

We think that in the first year of our recommendations the salary increase, to $122,000, should be very near the Three Province average, and we have the same view regarding the last year ($144,000). We cannot find a rational reason, however, for recommending an increase in the middle year which would produce a similar result. Were we to do so, the increases would be something like $10,000 in year one, $18,000 in year two, and $4,000 in year three, a result without inherent logic, and one

entirely dependent on the decisions made in other jurisdictions. We think it is more sensible to spread the three year increases approximately evenly over the period, even though in the second year the numbers are not near the Three Province average. The over-all result of our recommendations, is, however, representative of the relevant comparators.

Our recommendations will place the Judges' salaries in each of the three years at a level of 68.2%, 67.2% and 70.5% respectively of the federally appointed judges' salaries. These percentages are somewhat higher than the result of other JCCs recommendations, but are clearly warranted as other provincial judicial salaries are rising at a faster rate than are federal salaries. The best comparison for Manitoba Judges is other provincial, not federal, judges (although we have kept in mind the salaries of federal judges). The rates of increase in the salaries of other provincial judges, including those in the Three Provinces, require a response to ensure that the Judges maintain an appropriate salary relationship with other provincial judges. Even with the recommended increases, the Judges will still be measurably below the national averages in each year, as set out earlier.

Mr. Justice Wright said that the report of JCC3 struck a fair balance between competing factors "in the context of sensible comparisons with the position of judges

relative to others in our society". The comparison, as he made clear, is not necessarily of salaries (or of salaries only) but rather of "the position" of judges relative to others. Salaries are one factor, and pensions would be another, in the overall "position" of judges in relation to others. Other factors include, importantly, the nature of the work, and also the constraints imposed on judges from an economic and a personal perspective. We have taken all factors into account in coming to our recommendations.

Taking into account the other recommendations in this Report, we think the recommended salaries are fair and reasonable both to the Province and its taxpayers, and to the Judges.

9. Pensions

9.1 Present Structure

It is not disputed that adequate pension arrangements are an integral part of financial security and thus judicial independence. Each province has pension arrangements for its judges, as does the federal government for the federally appointed judges. We will outline the Manitoba arrangements, which the Judges asserted provided "one of the worst [judicial pension] plans across the country". The

Judges said that overall the Manitoba pension plan "offers significantly lower compensation to Manitoba Judges than is received by any other judge in Canada".

The entire issue of pensions is complex, and the submissions of the participants on this subject occupied a considerable amount of time at our hearings. The witnesses formally called testified only on the subject of pensions and we were given much material. In this Report we will set out our understanding of the current situation, the positions of the Judges and the Province, and our recommendations on pensions.

The Province's written submission contains a concise summary of the present situation. Prior to 1992, the Judges made the same pension contributions and derived the same benefits as did participants in the Province's civil service superannuation plan ("CSSP"). The pension benefits were calculated with reference to a formula based on the best five years average pensionable earnings, at a two percent accrual rate, multiplied by years of pensionable service, adjusted by a formula. In June, 1992, modifications were made for Judges. They continued to participate in the CSSP but, effective July 1, 1992, a special supplementary plan for them was established for full-time service as a Judge accrued on and after that date. This supplementary plan provides benefits that, when added to those a Judge receives under the CSSP,

produce the result that would be produced if the calculation of the allowance was based on an accrual rate of 2.61% (instead of 2%) of final average salary per year of service. The maximum number of years of benefit accrual equals 23.5. Thereafter judicial service continues to accrue under the CSSP until the 70% maximum is reached, in about five more years.

JCC3 recommended, and Mr. Justice Wright in his judgment approbated, that supplementary pension benefits be extended to cover judicial service before July 1, 1992, commencing from the date of appointment to the bench.

9.2 The Manitoba Provincial Judges' Association Request

The Judges made numerous requests for improvement of the pension arrangements. They based their requests, in large measure, against the backdrop of a comparison of pensions for judges in all other jurisdictions in Canada. The Judges said that, apart from Newfoundland, pensions for judges in all other jurisdictions, including the federal, range from a low of $88,000 per annum to a high of over $136,000, yet "a Manitoba judge retiring on full pension would receive a base pension of $77,420". In addition, Manitoba is the only jurisdiction, along with British Columbia, in which judges have to pay for a spousal benefit. A Judge who chooses

the spousal benefit in Manitoba would have his or her pension reduced to $67,743. We were provided with a considerable amount of statistical and actuarial data in relation to pensions and, at least in respect of the situation in other jurisdictions and the Manitoba numbers, these data were not challenged by the Province.

The Judges focused as well on the fact that roughly half their number came to the bench from the Manitoba civil service, either from service as a Crown Attorney or with Legal Aid. In that respect the Judges argued that the pension arrangements treat Judges from different backgrounds unequally, as there are not equal benefits for Judges recruited from the private sector and those recruited from the government or government agencies who have non-judicial but CSSP pensionable service. Judges who come from the government reach the 70% level more quickly than Judges who come from the private sector.

We note that private sector appointees will typically have had an opportunity to do some personal retirement planning, and that government appointees have earned whatever pension benefits have accrued to them.

We will summarize briefly the main features of the Judges' proposal:

- The Judges seek a "stand alone plan" not linked to the CSSP, such that, subject to transitional provisions, the Judges would have their own pension arrangements. The Judges said that nine jurisdictions now provide for such independent plans.

- The Judges proposed no change in the maximum pension benefit of 70%.

- The Judges proposed a change in the basis of pensionable salary from the present best five year averaging to best three year averaging. Only Manitoba uses a five year averaging formula. Four of the 13 jurisdictions (ten provinces, two territories and the federal jurisdiction) provide for final year or date of retirement salary and eight provide for best three years averaging.

- The Judges proposed a change in the number of years of service before retirement on full pension can be taken. In Nova Scotia, judges can retire at 65 on full pension with ten years' service. The federal jurisdiction permits retirement on full pension at the age of 65 after 15 years' of service. Four jurisdictions, including British Columbia and Alberta, require 23.3 years of service and Saskatchewan has a formula producing varying results. The Judges proposed that the number of years of service for retirement at full

pension be reduced to 19 years for a Judge appointed at age 46, 18 years for a Judge appointed at age 47, with the years of service diminishing in accordance with the increased age of appointment to 15 years for a Judge appointed at the age of 50. A Judge appointed at the age of 55 would be able to retire with full pension at age 70.

- Consistent with the above proposal, the accrual rate would be changed to 3.5% for each year of judicial service, but a higher rate would apply to Judges appointed over age 45.

- The Judges proposed that the spousal benefit be available without requiring the Judge to discount his or her own pension. The Judges propose the elimination of this cost (as noted, only British Columbia and Manitoba impose this cost). Judges who do not elect a spousal benefit would have a guarantee of ten years' pension with any balance after death payable to the Judge's estate.

- The Judges proposed a marginal increase in the contribution rate, from 6.7% to 7%, as being more consistent with what appears to be the practice across the country.

- The Judges also sought indexing of pensions in relation to increases in the cost of living. Six jurisdictions presently provide for such indexing and certain modified arrangements are in place in some other jurisdictions. In Manitoba (as in Saskatchewan and Newfoundland) indexing is not guaranteed. In Manitoba, indexing at two-thirds of the rate of increase in CPI is contemplated only if the performance of the CSSP permits; the pattern has been that such partial indexing occurs.

- Another request of the Judges related to membership in the plan. The Judges proposed that participation in the plan be mandatory for all new Judges and existing Judges who had no pre-judicial service in the CSSP. Those who had pre-judicial service in the CSSP could either remain therein, or transfer to the new plan, and certain transitional arrangements were sought.

- Other related or consequential changes were sought by the Judges.

The Judges' consulting actuary agreed that the plan proposals put forward to accommodate appointees from the private bar assumed they had no pre-appointment retirement plan or savings for that purpose.

9.3 Province's Response

We quote from the response of the Province, which summarizes the general thrust of its position:

> **"The issue of pensions must be viewed in relation to the fact that in Manitoba currently, there is no mandatory retirement age for Provincial Court Judges unlike other jurisdictions. The PJA [Judges] has suggested that improving pensions is an important component to revitalizing the judiciary . . . in the absence of a mandatory retirement provision there is no guarantee that any pension improvement would accomplish the stated goal of the PJA."**

The Province said:

- Judges at age 70 are required to receive their CSSP pension, but not their supplementary pension, unless they have actually retired. Judges over 70 can "double dip" if they do not retire, because they still receive their salary (and CSSP pension).

- A judge with pre-judicial CSSP service of 13 years who is appointed a Judge at 43 would receive a 70% pension by age 60, after 17 years of judicial service. This compares favourably with the position of civil servants who

would have to work longer to achieve a comparable pension.

- Lawyers who are appointed from the private bar should, prior to their appointment, be presumed to have made some reasonable pension arrangements up to that point in time, and it should not be the responsibility of Manitoba taxpayers to make up any deficiency if the appointed lawyer has not done so. We agree with that submission.

- Unless there was a mandatory retirement age there would be no obvious rationale for providing a full pension to judges at age 65.

The Province's consulting actuary dealt extensively with the cost of the Judges' pension proposals, which we will discuss below.

9.4 Recommendation

The above summary is only a cursory statement of the information that we were given. Evidence from the two actuarial witnesses took a fair amount of time, and the written submissions and related data were quite comprehensive.

We will refer to the Three Provinces' pension numbers, recognizing that in Bill 46 a JCC after April 1, 2002 must report on salaries, but not necessarily pensions, in those provinces. Earlier JCCs looked at the Judges' pension situation in relation to the Three Province average. JCC2 noted that the Three Provinces at that time had generous pension benefit formulas. For the reasons outlined earlier, we think the Three Provinces in all the circumstances are very good comparables on matters of judicial compensation, including pensions. The information that follows was provided by the Judges, and not disputed by the Province.

Based on a maximum entitlement (in Manitoba, reached at 28.1 years), after any applicable spousal reduction, and assuming for Manitoba a continuation of the 1998-99 salaries through 2001-02, and for New Brunswick a salary lower by $3,000 than will be the case for 2001, the 2002 judicial pensions in Manitoba and the Three Provinces would be:

Manitoba	$67,743
New Brunswick	88,436
Nova Scotia	95,900
Saskatchewan	93,091

If the pensions are calculated assuming retirement after 20 years service, assuming salary for calculation is in Manitoba $112,000, New Brunswick $141,202,

Nova Scotia $144,000 and Saskatchewan $143,000 and with applicable spousal reduction, they would be:

Manitoba	$ 51,156
New Brunswick	77,661
Nova Scotia	100,800
Saskatchewan	85,800

After 23.3 years of service, with the same assumptions as immediately above, the pensions would be:

Manitoba	$ 59,597
New Brunswick	91,252
Nova Scotia	100,800
Saskatchewan	100,100

Manitoba's pension in all three cases is substantially below the Three Provinces' pensions and, in some cases by much greater margins, below those in every other jurisdiction in Canada.

We have given consideration to all of the Judges' proposals on pensions. We recommend two specific changes, both to take effect as of April 1, 1999, thus applying to any Judge who has retired on or after that date.

The first recommendation we make regarding pensions relates to the elimination of the spousal discount. The requirement, when a Judge elects a survivorship benefit, to pay for that election with a pension reduction, is an anomalous arrangement in judicial pension plans (except for British Columbia where a JCC has recommended its elimination) and one which we think represents an unreasonable burden which should be eliminated. The Judges' actuary estimated that the cost of this reduction borne by a retiring Judge could be fairly estimated at about 12.5% of the pension (it would vary depending on age and gender). We recommend that the basic spousal benefit available to Judges be provided without the Judge being required to discount his or her pension. The pension would be paid for the life of the Judge, and thereafter 2/3rds of the pension will be paid to the surviving spouse for life. For a Judge without a spouse at retirement there should be a guarantee of ten years' pension with the balance after death payable to the Judge's estate. We agree with the Judges' comments that this would provide a "measure of fairness to those judges without spouses".

Secondly, we propose a reduction to three years, from the present five years, of the base for the calculation of the best salary period. Eight jurisdictions, namely, British Columbia, Alberta (after 1998), the Yukon (after 1998), Saskatchewan, Quebec, New Brunswick, Nova Scotia (if retirement is at 65) and Prince Edward

Island (for judges appointed after 1997), all base their calculations on the last three years or the best three years, which typically would be the same three year period. The North West Territories, Ontario, Newfoundland and the federal government base their calculations on the sitting judges' salary or the salary at the last day before retirement, which would typically be the same numbers. Only Manitoba is based on the best five years. We can see no reason why the Manitoba Judges should have their pensions calculated in this respect by what in practical terms is by far the least generous method of calculation in the entire country.

Neither of these two changes we recommend would apply to pre-judicial service. They would only apply to years of service as a judge (i.e., whether the benefits are under the CSSP or the supplementary plan). To extend these improvements to pre-judicial service would benefit only some Judges, and we do not think the distinction in circumstances should be compounded.

Although its written submission did not deal with the cost of pension improvements in any detail, the Province's expert witness did testify extensively on that matter. He said that, with pensions, cost is always a factor, and "it's always a question of affordability". The Judges readily acknowledged that their consulting actuary had not been asked to consider the cost implications of their pension

proposals. In his testimony he said that, not having costed the proposals, he could not say whether they were "affordable". The actuary readily agreed that this JCC should weigh cost factors.

We think that it is important to know the cost implications of our recommendations. In the salary area the cost is easy to determine. In the pension area it is not as easy to do so. After the conclusion of our hearings, and with the consent of the participants, we met with the two actuaries who had testified and asked them to advise us on the cost implications of our pension recommendations. What follows on that subject is derived from the report we received from the Province's consulting actuary. The Judges' consulting actuary reviewed that report, and believed that the approach taken to determine increased liabilities and current service costs was reasonable. He also confirmed that the estimates of increases in accrued liabilities and current service costs, as outlined below, appeared reasonable.

The actuarial report is based on a number of assumptions and on certain data. As at March 31, 2002, if no salary change was made (i.e., if salaries remained at the 1998-99 levels), the Judges' salary payroll would be $4,504,366. The accrued liability (about 63% of which is an unfunded liability), excluding existing retirees and Masters, in respect of the Judges would aggregate $15,377,190. The salary increases

we propose have an effect, of course, on pensions. If no changes are made at all in pensions, but our salary recommendations are implemented (thus increasing the payroll as at March 31, 2002, to $5,784,500) there will be a one-time increase in the accrued pension liability as at March 31, 2002 of $4,423,669, which would produce a total accrued liability of $19,800,860.

The removal of the spousal discount adds $3,279,167 to the accrued liability on a one-time basis, increasing it from $19,800,860 to $23,080,027, as at March 31, 2002. The reduction from five years to three years in the salary base increases the accrued liability on a one-time basis by $679,078 from $23,080,027, to $23,759,105, as at March 31, 2002.

These increases are immediate increases in unfunded liabilities as at March 31, 2002, which over time are funded and reflected in expenditures on a pay-as-you-go approach. As a result, the unfunded portion of the accrued liability increases from 63% to 76% as at March 31, 2002.

In addition, there are annual current service cost increases for future service accrued after March 31, 2002. One component of this cost increase is a direct result of higher salaries. That component increases cost by $226,900 per year to

$1,024,100. The spousal discount removal causes a cost increase annually of $233,100 raising that cost factor to $1,257,200. The three year base causes a current service cost increase of $56,200 per year to $1,313,400.

The current service cost expressed as a percentage of salaries does not change at all as a result of the salary increases. In percentage terms, the cost in relation to payroll of the spousal discount removal is an increase of 4.03%, and of the three year base change is an increase of 0.98%.

This can all be summarized as:

1. Increase in Accrued Liabilities (one-time) as at March 31, 2002:

	After	Before	Increase
Salary Rate Update to March 31, 2002	$19,800,860	$15,377,190	$4,423,669
Joint Normal Form (67% to Spouse)	23,080,027	19,800,860	3,279,167
Best 3-Year Salary Average	23,759,105	23,080,027	679,078
Total			$ 8,381,915

2. Annual Cost (repetitive): Current Service Cost post March 31, 2002:

A. In Dollars	After	Before	Increase
Salary Rate Update to March 31, 2002	$1,024,100	$ 797,200	$ 226,900
Joint Normal Form (67% to Spouse)	1,257,200	1,024,100	233,100
Best 3-Year Salary Average	1,313,400	1,257,200	56,200
Total			$ 516,200

B. As a % of Judges' Salaries	After	Before	Increase
Salary Rate Update to March 31, 2002	17.70%	17.70%	0.00%
Joint Normal Form (67% to Spouse)	21.73%	17.70%	4.03%
Best 3-Year Salary Avenue	22.71%	21.73%	0.98%
Total			5.01%

These costs and increases in accrued liabilities are direct consequences of what we think are required changes in the salary and pension arrangements, and they are to be expected when salaries and pensions are improved. We think they are well within the capacity of the Province to absorb.

There is an interest cost as well (about $534,000 per year), because the Province does not fund the pension plan (i.e., the CSSP and the supplementary plan). This is a result of the "pay-as-you-go" approach adopted for these plans, and an interest factor is to be expected when liabilities are accrued and not funded.

We regard the costs of the recommended pension improvements as reasonable, keeping in mind the inadequacies of the present arrangement and the significance of the proposed improvements, especially the very great importance to the public that Judges have an adequate pension arrangement to ensure financial security. We think these two changes will be very important factors in the overall attempt to ensure

reasonable financial security for the Judges.

We have considered the many other requests of the Judges regarding pensions. What the Judges were proposing, commencing with the introduction of a stand alone plan and then the other features to be added, would represent a fundamental and massive restructuring of the pension structure for Judges. Certainly the stand alone plan, while logical in principle, has many implications. Several jurisdictions (British Columbia, Yukon and Nova Scotia) do not have stand alone plans. We observe that the Province's actuary advised us that the present pension structure is capable of being amended to accomplish virtually any result which is desired, and a stand alone plan is not required for that purpose.

There would be a very significant cost to the implementation of all the Judges' proposals. While cost estimates are necessarily only estimates and are based on a number of assumptions, the Province's expert actuary did some analysis of cost increases that might occur. Taking the present plan with what he referred to as the present level of "supportable indexing", and then adding onto it a guaranteed two-thirds indexing, normal form joint survivor death benefit, a best three year average basis, a higher accrual rate of between 3.5 and 4.67%, and an increase in salary of ten percent would, in combination, increase the Province's portion of the Judges' active

liability at November 1, 2001, from about $9.5 million to about $22 million. The total increase in current service cost post November, 1, 2001, would be in the range of $1,200,000 per year.

The order of magnitude of this cost increase was not disputed by the Judges. Having in mind the importance of "fairness" to the Province (and its taxpayers) as well as to the Judges, we have concluded that the cost of the balance of the pension proposals, beyond what we have recommended, renders them unsuitable for us to recommend.

We have recommended changes in two very important aspects of the pension structure where there seems to be virtually complete consistency across the country except for Manitoba, and where we believe change is required.

Our recommendations on salaries and our recommendations on pensions should be regarded as a set of linked recommendations in a "compensation package". Our Report and recommendations are premised on a total compensation model and were it not for the salary recommendations we may have recommended further improvements in the pension arrangements or other benefit enhancements.

10. Legal and Other Fees

10.1 The Manitoba Provincial Judges' Association Request

The Judges requested that we recommend that "the legal fees and the related costs of actuaries in this proceeding" should be paid by the Province, subject to taxation by this Committee. They argued that counsel is essential to the process and that, without the participation of counsel, the process, which is for the benefit of society and not principally the Judges, would be diminished.

The Judges requested that the actual, reasonable costs of the Judges on a solicitor-client basis be paid by the Province. They proposed that we set a date prior to which submissions as to costs would be made. The Judges would tender their accounts and we could then consider the submissions of the participants.

10.2 Province's Response

The Province said that any request for fees and costs must be capped. This was the approach taken by JCC3 which capped fees and costs at $15,000. The Province said that such cap was appropriate and should not be revised. It argued that the Judges should have a responsibility for a portion of the costs, either a percentage of

the fees or all costs beyond the cap. The Province specifically recommended that both approaches be used by us such that the Province would pay a certain percentage of fees and costs up to a maximum amount. It suggested that if the "current cap" was to be revised, then there had to be disclosure of fees and expenses to justify why the cap was inadequate. It also suggested that the compensation for fees should be in accordance with the standard government tariff for external legal counsel.

10.3 Recommendation

The entitlement of the Judges to compensation for expenses incurred in connection with their participation in the JCC process is not disputed by the Province. What is at issue is the amount and the responsibility, if any, of the Judges for sharing in the costs.

In the Report of JCC3 (page 33), it is noted that the Judges said they had incurred significant personal costs in connection with the submission to JCC3. JCC 3 said:

> **"In that making periodic representations to the Judicial Compensation Committee is now a part of a constitutionally required process they have requested relief by way of a professional allowance for each judge. We sympathize with this request and recommend that the Provincial Judges Association of**

> **Manitoba be provided with an allowance of up to $15,000 to cover the cost of having submissions prepared and submitted to each Judicial Compensation Committee commencing with the current Judicial Compensation Committee. As with any reimbursable expense, fees and disbursements claimed should be supported with invoices and receipts."**

The standing committee of the legislature rejected that recommendation. Among the three "reasons" given were that a JCC is a fact finding and recommending body and, accordingly, "Legal representation and extensive briefs are not required". The standing committee said that if the Judges wish to retain lawyers to represent them, they should bear the costs of that representation.

Mr. Justice Wright concluded that there was "not yet" a constitutional requirement that judges be funded for their representation before JCCs. He said:

> **". . . those commissions themselves are entitled to decide that, in appropriate circumstances, such representation is of value and importance to them in carrying out their constitutional duties and that in turn can justify a recommendation for payment of the costs to the judges for that assistance, in whole or in part."**

In coming to that conclusion he relied on the majority decision in a Newfoundland Court of Appeal case (referred to at pages 27 et seq in his judgment). That Court had found that, while there was not a "universal constitutional rule"

requiring in all cases that governments cover the costs of the judges' participation, a particular tribunal could, "upon a full consideration of the particular circumstances", recommend that all or a portion of the costs of representation be paid. The Court said that the commission should be satisfied that:

> **"... the participation of the judges was of significant assistance to the tribunal in understanding the scope and implications of the issues at stake and in thereby enabling it to be objective and effective. In that way, the entitlement of the judges to reimbursement for their costs will be tied back to the constitutional requirements which are what, in a given case, justify treating judges differently [from other situations where the government is asked to fund costs of representation]."**

Mr. Justice Wright noted that JCC3 had placed "significant reliance" on the brief and information given to it by the Judges as well as by the Province. He said that it could reasonably be inferred that JCC3 felt the Judges' submissions provided "a real" benefit to it in the exercise of its obligations. He found that the reasons advanced by the Province for rejecting the recommendation were not rational. In particular, he stressed the constitutional factor related to the work of a JCC and noted that this was a factor that the Province had not considered.

We have no hesitation in saying that we have found participation by the Judges through their counsel and actuary to be essential to the effective workings of

this JCC. Having had the benefit of six days of hearings and extensive written submissions from the participants, we similarly have no hesitation in saying that the role of all counsel (and actuaries) was essential for the effective functioning of this JCC. The Judges are precluded from directly negotiating with the Province, and this JCC is in place in part to depoliticize and act as a buffer in the process. If the Judges themselves made the submissions before us, engaged, for example, in the cross-examination of the Province's witnesses and delivered the oral arguments, it would be (if not directly negotiating with the Province) a quite unseemly role for the Judges to play. The interposition of their counsel effectively added to the depoliticization of the process, yet permitted the vigorous advancement of the Judges' cause.

We must say, moreover, that we would have been unable to perform our work without legal representation and the extensive briefs we received. The issues that have been placed before us are complex, and it is difficult to conceive how such submissions could have been made without the involvement of legal counsel. The role of the Judges in the process, advanced through their lawyers, was necessary to enable us to fulfil our constitutional mandate.

With great respect, when JCC3 purported to fix an allowance of $15,000 applicable not only to itself, but to "each judicial compensation committee

commencing with the current judicial compensation committee", it could not bind this JCC to that number or approach. We must consider the role played in this case by counsel, and then make a recommendation based on the facts of this case.

Mr. Justice Wright, in his conclusion page (page 49), indicated he would declare the implementation of JCC3's recommendation that the Judges be reimbursed by the Province for their costs of representation up to the cap of $15,000. He made no reference to the observations of JCC3 relating to future JCCs.

We do not think that we should engage in the taxation-like procedure suggested by the Judges, as we are not satisfied that it is either necessary or desirable to do so. While we do not have any statement of the amount of the legal and representation costs, we do know that we received extensive submissions from counsel. We also know that part of the work involved in preparing submissions was available from submissions made by counsel to earlier JCCs, and perhaps to similar tribunals in other provinces, since the Judges' counsel has acted in other jurisdictions for provincial judges. We know also that out of pocket expenses were incurred in connection with the engagement of the Judges' consulting actuary.

It is ultimately to ensure the soundness of the Province's judiciary and,

therefore, ultimately for the Province's benefit, that the JCC process exists. It is our view that the Province should pay the majority of the costs. However, the Judges should also have some financial stake in the process. We think that a reasonable approach would be as outlined by the Province, and that is to say, to recommend that the Province pay a certain percentage of costs and fees up to a maximum amount. We think the costs and fees should be calculated on the same basis as in the standard government tariff in place for external legal counsel and, to the extent that one exists (but failing which, reasonable actual costs should be utilized), for external experts such as the Judges' consulting actuary.

Subject thereto, we recommend that the Province pay 75% of the Judges' costs and fees up to a maximum aggregate payment by the Province of $30,000. We have calculated the $30,000 amount taking into account the direct involvement of counsel in six days of hearings, as well as the preparation of the detailed submissions, and knowing that a portion of that amount will be allocated to the costs of the consulting actuary. On balance, we think that the percentage and maximum amount of the Provincial payment is fair and reasonable to both sides.

11. Other Issues

11.1 Issues Raised by Provincial Judges' Association

A number of other issues, related to what are normally "fringe benefits", were raised by the Judges. In summary, they are:

(a) Vacations

Currently, Judges with up to 19 years of service are entitled to 25 days of vacation, increasing thereafter to 30 days. Service as a Crown Attorney or Legal Aid lawyer is included in the calculation of years of service, resulting in some disparity of treatment in comparison with Judges from the private sector. The Judges sought a termination of this linked prior government service so that all Judges, regardless of length of service, be entitled to 30 days paid vacation leave. Unused days should be banked. They argued that the midpoint for vacations in Canadian judicial jurisdictions is about 30 days a year.

(b) Sick Leave

Sick leave is considered an earned benefit accruing at about one day per pay

period to a maximum accrual of 208 days. The Judges provided us with information indicating a variety of circumstances around the country: New Brunswick had a maximum of 240 days, Saskatchewan gave 18 days per year, the situation in Nova Scotia was unknown to the Judges, and there were other provisions elsewhere. The Judges said we should not be "swayed by the situation in other jurisdictions" (not a position they adopted elsewhere in their submission). The Judges recommended that sick leave should not be an earned benefit, and that there be no limits on the amount of sick leave to which a Judge is entitled except to the extent that the Judge becomes eligible for long term disability coverage. The Judges said that sickness leading to an income dis-entitlement threatens financial security and thus judicial independence. The current system should be abolished , they said, and unlimited sick leave should be granted.

(c) **Disability Coverage**

"Total disability" means inability to perform the work of a Judge. On a permanent disability the Judge receives payments of 70% of salary until the earlier of recovery, death and age 65. It is apparently understood, but to the Judges not satisfactorily documented, that any salary cap that might apply in absolute dollar terms to civil servants does not apply to the Judges.

Many Judges work past the age of 65. The Judges said that a simple way to provide fair and reasonable protection to all Judges is to provide disability coverage without regard to any age limit. Benefits should be paid if a Judge becomes disabled and is expected to recover within a reasonable period of time. The costs, according to the Judges, would be minimal.

(d) **Life Insurance**

The Judges participate in the plan administered by the Manitoba Civil Service Superannuation Board. At age 55 the amount of coverage starts to diminish. For civil servants the coverage does not reduce until age 65. No other jurisdiction in Canada, to the Judges' knowledge, starts to reduce life insurance coverage before age 65. The Judges want the reduction to start at 65, as with civil servants, and continue until age 75.

(e) **Travel Expenses**

We heard much information about travel expenses allowed to Judges when traveling for work. These relate to inadequate meal allowances, insufficient government approved hotels and a number of other matters. The Judges' position can

be summarized by saying that the actual, reasonable expenses incurred in connection with travel for work should be compensated.

(f) **Professional Allowance**

The Province is required to reimburse Judges for all reasonable expenses incurred in the carrying out of their duties and the Judges are to be provided with the necessary tools, such as computers, needed in their work. The Judges say that this arrangement is unworkable because "claims for reimbursement are regularly denied by the administration" and a number of examples were given to us. The Judges proposed an annual allowance of $3,000, the use of which would be in the discretion of the individual Judge. This would obviate the necessity of submitting bills to the Province and avoid the uncertainty of acceptance or rejection.

(g) **Education Allowance**

Currently there are certain ways in which legal education is provided to Judges. For example, the court will occasionally organize educational programming. The National Judicial Institute organizes programming, but Manitoba does not support that Institute. Accordingly, while Manitoba Judges may attend its programs,

the cost of registration is over double that of judges from all other provinces (except Quebec which also does not support the Institute). From time to time (but very infrequently) a Judge may be sent to a seminar or conference organized outside the province.

The Judges said that the educational budget for the court has been $40,000 per annum, which has not changed for at least a decade. The Judges said that this amount is quite inadequate, and that an education allowance in the amount of $2,000 per Judge per year should be allocated. Each Judge would use that allocation in his or her discretion.

(h) **Severance Pay**

Judges receive severance pay in the amount of one week per year of service to a maximum of 23 weeks. The Judges proposed that existing Judges be entitled upon retirement to the benefit to which they would have been entitled if they had retired on the day before implementation of this Report. For those Judges appointed after such implementation, no severance benefits should be available. Severance pay for existing Judges is a vested benefit and has formed part of their retirement planning. Bill 46 states that the provisions in respect of severance pay (and vacation

leave and sick leave) remain in place until the recommendations of JCC4 are dealt with by the legislature. We understand the Judges' position to be that so long as there is no stand alone judicial pension plan, the position advanced on severance pay should be as set out above.

(i) **Compassionate Leave**

The Judges requested that the current entitlement of members of the Manitoba civil service governed by the Manitoba Government & General Employees' Union ("MGEU") master agreement be extended to Judges. The Judges asked that we recommend they be entitled to compassionate leave of up to five days per occasion at the discretion of the Chief Judge exercised in accordance with court policy to be established.

(j) **Family Related Leave**

As with compassionate leave, the Judges sought an extension to them of the family related leave provisions in the MGEU master agreement, with certain amendments. Judges should be entitled to up to five days of family related leave with pay in each fiscal year at the discretion of the Chief Judge exercised in accordance

with court policy to be established. Those days would be independent of sick leave. The Chief Judge would be entitled to grant additional days in extraordinary circumstances.

(k) **Maternity/Paternity and Adoption Leave**

Judges are not eligible for Employment Insurance benefits. The Judges requested that they receive 93% of a Judge's weekly rate of pay for the 17 weeks of maternity leave as is currently available to Crown Attorneys. In respect of parental leave, the Judges sought the same provisions as civil servants receive, which is leave without pay for a period of 17 weeks. Adoptive leave provisions as in the MGEU master agreement were also sought.

(l) **Extended Health Care Benefits**

The Judges sought an improved prescription drug plan. The current plan provides for the payment of 80% of eligible expenses to a maximum of $200. The Judges sought that this coverage be increased to 80% of eligible expenditures to a maximum of $1,000.

(m) **Equality Among Judges**

In this area the Judges noted again the disparity of treatment in that certain Judges who have prior civil service credits, notably in the areas of pension, sick leave and vacation, have a greater benefit than their counterparts from the private sector. The Judges asked that we recommend methods of ending all distinctions which exist between Judges originating from the private sector and those from the public sector.

(n) **Past Practices Clause**

The Judges said that, in the past, judicial compensation has been tied in large measure to compensation of the civil service. The Judges said it was not clear where the line has been drawn between what ought to be government policy and what ought to be determined by a JCC. They gave the example of life insurance where, for civil servants, the age at which coverage begins to diminish has been raised to 65 whereas, as noted earlier, it begins earlier for Judges. The Judges sought (page 95) a recommendation from us that would, in effect, "create a starting point . . . from which committees in the future can make recommendations".

They also noted that Bill 46 repeals the statutory entitlement of Judges to

. . .

certain benefits. Section 11 (1) in the existing legislation gives Judges certain benefits, but under Bill 46 those will all be determined on the recommendation of a JCC. The Judges said it was therefore essential that there be something in the nature of a past practices clause which would serve to protect the benefits and provisions repealed by Bill 46 as well as those which have not been the subject of specific statutory attention but are received as a matter of government policy.

11.2 Province's Response

The Province said that there was a "principle" of maintaining benefit comparability between Judges and senior provincial public sector workers. Consistent with that "principle" (and assuming we accept and apply it) the Province thought that this JCC could, if it considered them appropriate, recommend certain benefits improvements for Judges. These would include:

(a) The extension of the new Province paid prescription drug plan which came into effect for civil servants on October 1, 2001;

(b) Participation, as with civil servants, in the ambulance and hospital semi-private plan at Provincial expense;

(c) A Province paid vision plan, which is provided to civil servants, could be extended to Judges; and

(d) An increased maximum benefit in the dental plan, and changes in other areas, such as coverage during maternity leave, could also be provided.

In general however, it was the Province's position that the benefits received by civil servants, and no more, should, prima facie, be given to Judges unless the Judges could demonstrate any rational basis for enlarging upon those benefits.

The Province dealt specifically with a number of the requests of the Judges. As to vacation, the Province said that, de facto, newly appointed Judges have been receiving at least five weeks of vacation upon appointment. The Province said that, because the Judges were adopting a labour-management stance, it was appropriate to examine the Judges' request in the context of their working conditions and the Province raised a number of questions regarding the time Judges actually spend at work. The Province sought additional information from the Judges as to the time spent at work. The Province said that after all data was examined we might decide to recommend either the status quo or a standardization proposal, but at 25 days rather than 30.

The Province opposed any carry over of vacation days without limit. Vacation banks represent a liability of the Province and the Province sought information on the

current vacation banks of Judges. We were given information that indicated terms of vacation entitlement (including carryover). As at November 7, 2001, 21 Judges have up to 30 days, 14 Judges have between 31 and 60 days, one has 64 days, one has 89 days, one has 99 days, one has 105 days and one has 147 days. The Province suggested that if the vacation banks of Judges are high (which would presumably mean anything over the maximum that can be carried over by civil servants, which appears to be anything over six weeks) then we should recommend measures to ensure "the problem is corrected".

The Province requested information on the current recording and utilization of sick leave by Judges in order that it could determine the cost of the proposal by Judges that there be an unlimited amount of sick leave made available. The Judges subsequently advised us, though counsel, that it would not provide detailed information regarding sick leave and that "Judges are professionals and arrange their lives and work accordingly". They did provide information on sick leave entitlement. Of 40 provincial Judges, as at November 16, 2001, 24 had the maximum 208 days sick leave credit. The remaining 16 had entitlements ranging from a low of 10 days to a high of 205 days. The Judges also advised that, in the first ten months of 2001, an aggregate of 298 days sick leave had been taken by the Judges. The Province pointed out that, with sick leave at full pay and long term disability at 70% of pay,

the effect of the Judges' proposals would be essentially to render irrelevant the long term disability plan since a Judge who would otherwise qualify for it would obviously prefer to stay on sick leave. The Province noted that JCC3 considered the matter and recommended the elimination of the provision for any sick leave extension beyond 208 days, which recommendation was accepted by the legislature.

As to the long term disability plan, the Province confirmed that there was no salary cap on the Judges' disability benefit. Judges on long term disability receive 70% of salary. The Province thought there was no compelling reason to change the period for which benefits are payable (up to age 65).

On the life insurance issue, the Province suggested that consistency could lead to the conclusion that changes to the actuarial reduction, consistent with civil servants, would be appropriate. The Province made a detailed suggestion involving the age at which the reduction commences, the amount of the reduction that should be applied, and further reductions at later ages.

The Province said that travel expenses should continue to be administered and handled as at present.

The Province said that any professional allowance proposal which would permit unused amounts to be carried over at the discretion of the Judge would be unacceptable and inherently unfair. The Province generally expressed concerns about open-ended systems.

The Province expressed similar reservations about the educational allowance proposal. It suggested that the best approach would be to have an all inclusive amount because otherwise Judges would be allowed to pyramid their benefits. Any claims for educational matters must be accompanied by receipts.

The Province accepted the Judges' proposal on severance pay.

The Province said that the leave with pay proposals advanced by the Judges were inconsistent. On the one hand the Judges argued that the judiciary was professional and independent and on the other they advanced a "traditional labour relations proposal for increased leave of absences with pay". The Province did not agree that a past practices clause should be included in any set of recommendations and suggested that it was neither necessary nor desirable.

11.3 Recommendations

The requests by the Judges, involving about a dozen specific matters, as with their other requests presented to us, carry cost implications, some more significant than others. In reaching our decision on these requests we have borne in mind the cost of our salary recommendations and the costs of the two changes we are recommending in pensions. Given those costs, we have concluded that we will not make any recommendations for change in any of these other areas raised by the Judges. We think it is very important that the improvements in salaries and pensions be made, and the aggregate cost of those changes is sufficiently high to persuade us not to make any recommendations for changes in what might be referred to as the "fringe benefit" area.

We will note, however, and recommend, that, in the terms of the Judges' proposal (page 89), "existing judges be entitled upon retirement to the benefit to which they would be entitled as if they had retired on the day before" this Report's implementation . . . "for those appointed after implementation, the severance benefit should not be available".

To ensure that any matter inadvertently not covered in this Report is not lost

to the Judges, we recommend that Judges be entitled to continue to receive all benefits which they now receive, even if no specific recommendation has been made by this JCC on any such benefit.

The Province provided us with a list of benefits regarding which we might consider it suitable to make recommendations, if our approach was one of maintaining benefit comparability with provincial public sector workers. This is not our approach. The Judges are neither civil servants, nor employees, and they have many benefits as a result of the independent nature of their positions. There is difficulty in linking them with public sector workers for some purposes but not for others.

We note the ongoing dispute between the Judges, or some of them, and the provincial administration in relation to such items as expenses incurred. With the direction of Mr. Justice Wright that Judges are to be reimbursed for reasonable expenses incurred in the carrying out of their duties, we do not think we can add anything further that will be of assistance in the resolution of any such dispute.

On several occasions in our hearings, and subsequently, the Province asked that the Judges provide certain information. It made the request through this

Committee perhaps because it does not want to appear to be "negotiating" directly with the Judges. The Province said that it was important for this information to be provided, so that an appropriate response to the Judges' submission could be given. Examples of the information sought include whether time away from work, e.g., an afternoon off, is recorded as vacation time (or how it is recorded, if at all); the amount of current vacation banked time of the Judges (on a no-names basis); and the manner of recording and utilization of sick leave.

The Judges responded that some information would be provided, but unless the requests represented "proper inquiries by government of the Court" the Judges would decline to respond. The Judges said that many of the requests were inconsistent with judicial independence. They did provide information on a number, but not all, of the matters. The Province then told us that the Judges' "refusal to provide information has a significant impact" on its ability to respond to the Judges' submission.

Whether or not we have the authority to do so, we do not have either the need or the inclination to enter this debate or to require the production of information. Our role is to report and recommend on salaries and benefits. Bearing in mind the nature of our recommendations and the absence of any recommendations by us on "fringe

benefits", we have not been hampered in our deliberations by any lack of information. We also think that, in this result, the Province has not been adversely impacted by a lack of information. We observe that subsequent JCC's, by Bill 46, are to proceed "in an inquisitorial manner", a statutory direction that does not apply to this Committee. Subsequent JCCs may also be more inclined than this one to make recommendations regarding "fringe benefits". It may well be that information that was requested but was not produced to the Province may be required to be produced by a future JCC, as it fulfills its responsibilities within a broader statutory framework than the one in which this Committee operates.

12. Masters of the Court

As in other provinces, the Court of Queen's Bench has judicial officers known as "Masters". The Masters have been a feature of the judicial landscape in this province for a very long period of time. They are "full jurisdiction" Masters, and carry out a wide range of judicial responsibilities.

There are five full-time Masters in this province, one of whom is designated as "Senior Master". Two of the Masters are female and three are male. They were appointed during periods of time between 1984 and 1997. Before appointment four

were in the private practice of law and one was in the public sector.

The issue of compensation for the Masters has been a festering one, for over a decade. By the late 1980's the Masters had been classified by the Province as "Senior Legal Officers", a civil service classification. Starting at that point, the Masters' compensation fell behind that of the Judges. The Judges and Masters were each paid $64,607 in 1983. In 1985 the numbers for both were increased to $67,084. By 1989 the Masters had risen to $68,678 and the Judges to $85,090. The disparity continued to grow such that in 1999 the Masters received $89,669 whereas the Judges received $112,000.

In 2000 the Masters' salaries were increased to $91,732. Bill 46, to which we have referred frequently above, amended not only The Provincial Court Act, but also The Court of Queen's Bench Act. With effect from the date it received royal assent, namely July 6, 2001, Bill 46 amended The Court of Queen's Bench Act to provide as follows:

> **"Masters' Compensation**
> **11.17 (1) Masters, other than the Senior Master, are entitled to receive the same salary and benefits, including pension plans, vacations, sick leave, disability benefits, travel expenses and allowances, as Judges of the Provincial Court of Manitoba . . ."**

A similar provision is made for the Senior Master, in relation to an Associate Chief Judge.

We heard submissions from counsel for the Masters and for the Province. Both participants agree that our determination as to salary and benefits for Judges shall automatically apply to the Masters, including the Senior Master (in relation to an Associate Chief Judge) effective July 6, 2001. The Province indicated to us that from that date the Masters have in fact been paid at the same level as Judges.

In their submission the Masters provided to us details and documents relating to the dozen or so years during which their salary parted company with that of the Judges. There was considerable communication from the Masters to governmental officials, complaining about the disparity, and the level of compensation of the Masters. The situation was dealt with in the new legislation.

The thrust of the submission to us on behalf of the Masters was that we ought to make recommendations for retroactive adjustments to the Masters' salaries and benefits. The issue as to for what time period these retroactive adjustments should be made was stated in the following way in the Masters' submission:

". . . for an appropriate period prior to January 1, 2000 . . . it

would be both logical and equitable . . . *that these adjustments* should date back to the time when the inappropriate classification was put into effect . . . for practical reasons some shorter period consistent with the six year limitation on debts, for example, would be reasonable. At minimum it is submitted that the period of retroactivity should be no less than the period of time recognized by the former administration, namely April 1, 1997."

In making its reference to January 1, 2000, the Masters assumed that this was "the same period as that under consideration for the Provincial Judges". In fact, as we have indicated earlier, we are making recommendations regarding Judges for the period commencing April 1, 1999 (and concluding March 31, 2002).

The Province took the same position regarding the Masters as it did regarding the Judges. It said that this Committee does not have jurisdiction to make recommendations with retroactive effect. Any compensation changes regarding the Masters "should commence no earlier than the date of appointment of this committee" (page 3).

Legislation was enacted in 1999 and proclaimed in force on January 1, 2000 (Chapter 34, The Court of Queen's Bench Amendment and Consequential Amendments Act) which, according to the submission of the Masters, "provided a legislative framework to address the independence of the Masters". The legislation

did not include certain provisions that had been requested by the Masters to provide that their compensation and benefits would equate to that of the Judges. This was, as noted, accomplished by Bill 46.

The Masters suggested that this Committee has the mandate to review, determine and report on all compensation issues with respect to the Masters. They suggested that we had the authority to consider retroactive adjustments to compensate the Masters for the losses experienced "by the inordinate and self-serving delay generated by the Province's failure to address the independence and compensation issues".

The Masters suggested that it was not disputed that their compensation should be linked to that of Judges, as was finally acknowledged in Bill 46. This has been the practice in British Columbia, Alberta and Ontario and, said the Masters, was also the practice in Manitoba until 1988 and finally again in 2001 and thereafter. The Masters further argued that Bill 46 is tantamount to an acknowledgment that Masters have not been fairly treated by the Province for the years during which they were compensated on the same basis as senior civil servants, at a lesser level than Judges.

When amendments to The Court of Queen's Bench Act were tabled in the

House in mid-1999 which, according to the then Minister of Justice, were intended "to ensure the requisite level of independence for Masters", the Minister indicated, by letter to the Chief Justice of the Court of Queen's Bench, that:

> **". . . the government has been sensitive to the issues masters have been raising. For that reason and recognizing the time it will take for the next compensation committee to take effect, the government has authorized an increase in salary for masters. The increase allows for the same percentage increase in salary as that recently approved by the legislature for provincial court judges, adjusted by the increases already granted to masters as civil servants for the period since 1997. Further compensation issues other than the level of salary will be addressed by the compensation committee."**

The Masters noted that they were subject to payroll deductions pursuant to the program instituted by the Province and, although after their successful court challenge the Judges had their reduced pay reinstated, that did not occur for the Masters. Until July, 2001, the Masters were in receipt of the same pension benefits, disability and insurance plans, holidays and sick leave as Manitoba civil servants. The Masters received no allowances except for the meal and gas allowances applicable to Manitoba civil servants.

The Masters suggested that this JCC should not permit the Province to take advantage of such a small group which attempted in good faith to advance their

position through proper channels. They said that the facts demonstrate that the Province neglected or refused to address concerns which the Courts have identified and indeed which the Province has acknowledged for many years. According to the Masters, the Province wrongly treated them as civil servants for the purposes of compensation for over a decade. The Province unilaterally imposed pay scales significantly lower than those of the Judges and, notwithstanding that the Masters' status has now been fairly acknowledged in legislation, the Province should not be permitted to "keep the fruits of their neglect". The Masters sought "a significant retroactive adjustment to the salaries and pension benefits" which they receive.

The Masters estimated that the fiscal effect of the disparity, taking as an example a Master appointed in 1987, was a total amount of about $220,000 for that individual, not taking into account lost opportunity and the wage rollback suffered by the Masters. On an alternate basis the Masters suggested that, for the period of time when they were treated and paid as civil servants the principle of retroactive reclassification ought to be applied. The first formal request submitted on behalf of the Masters, in mid-November, 1989, should be considered a request for reclassification, and the Masters wanted salary adjustments made retroactive to that date.

On compensation, pension benefits and almost all other fringe and related benefits, the Masters deferred to and joined with the submission of the Judges. They sought a separate allowance for educational programs, including out of province travel for educational programs, and an additional allowance for clothing and miscellaneous expenditures.

In their response submission the Masters stated:

> **"The Masters are independent judicial officers and the nature of the position at common law carries with it judicially independent status."**

In its submission to us the Province did not challenge the view of the Masters that, like Judges, their judicial independence is a fundamental principle, and should be constitutionally protected. That constitutional protection, so far as it involves financial security, exists in legislation at least from and after July 6, 2001.

Prior to the enactment of Chapter 34 there was no authority on the part of any JCC to consider the compensation of the Masters. With effect from the proclamation in force and effect of Chapter 34, namely, January 1, 2000, The Court of Queen's Bench Act was amended to read:

"Judicial Compensation Committee

11.17 (1) The Judicial Compensation Committee established under subsection 11.1 (1) of The Provincial Court Act shall, in addition to its duties under that Act, review, determine and report to the Minister of Justice on, the salaries and benefits payable to Masters, including pensions, vacations, sick leave, travel expenses and allowances and the following provisions of that Act apply, with necessary modifications, to the Judicial Compensation Committee . . .

Committee's Report re Masters

11.17 (2) The Judicial Compensation Committee shall review and report to the Minister of Justice with respect to Masters under subsection (1) at the same time as it does so with respect to Judges of the Provincial Court . . ."

Although the Masters are not Judges, the clear intent of Chapter 34 is to vest them with a sufficient degree of independence that, for our purposes, renders any difference immaterial. Those provisions in The Court of Queen's Bench Act were the law from January 1, 2000 until the coming into force of Bill 46 on July 6, 2001. At that time the above sections in The Court of Queen's Bench Act were replaced with the provisions quoted earlier.

The effect of all of this is that, from January 1, 2000, this JCC, being the JCC established under subsection 11.1 (1) of The Provincial Court Act, is obliged to review, determine and report on the salaries and benefits payable to Masters. As the

participants agree, as of July 6, 2001 that jurisdiction ends and the Masters thereafter automatically receive the same compensation package as do Judges.

The Province argued that "it is clear that the JCC process did not apply to Masters prior to [January 1, 2000]". We agree with this assertion, but that does not resolve the question before us. Once Chapter 34 was the law of this Province, the JCC referred to in Section 11.17 (1) had the legislated mandate to "review, determine and report" on salaries and benefits of Masters. At the time JCC4 came into existence on February 21, 2001, Chapter 34 gave this JCC the responsibility and obligation to act thereunder.

As in the case of the Judges, there is no restriction or limitation either expressed or reasonably implied in either the governing legislation or the Order in Council that imposes a temporal limit on our capacity and, indeed, our duty to review, determine and report on the salaries and benefits of Masters. That the applicable legislation came into force on January 1, 2000 does not mean that our recommendations cannot have effect as of a time prior to that date. Once Chapter 34 become effective, giving us the powers referred to, there is nothing that would suggest that this Committee must look at the matter only prospectively.

In light of the provisions of Bill 46 we do not need to analyze in detail the role, responsibility and work of the Masters. Among the observations made by the Masters and not challenged by the Province, were: "They are judges in everything but name"; "They have a regular docket in Family Court"; "They are Registrars in Bankruptcy"; "Their role is complex"; "They are required to give written reasons" (one example was given of a Master who has written almost 300 written decisions over 14 years); "They have been undervalued by the system." Counsel for the Masters made it clear that other "judicial officers" did not have the same characteristics as did the Masters; those others were more like clerks, fulfilling an administrative role, whereas the role of the Masters was similar in fact to that of Queen's Bench Judges except that they did not have criminal law authority. They had a breadth of jurisdiction encompassing family law, administrative law, bankruptcy and other matters. It is clear that, as a matter of public policy from and after July, 2001, the Province has determined that the work, responsibility and position of the Masters entitles them to the same compensation package as the Judges.

The facts provided to us demonstrate that the work of the Masters has not diminished from the time when their salaries started to diverge from the Judges'. At the very least, the work and responsibilities of the Masters remained at the same relative level, and if anything appears to have increased. During this time the Masters

were compensated essentially on a basis unilaterally determined by the Province and outlined in detail in the submissions.

We do not think that the enactment of Bill 46 is tantamount to a recognition by the Province that it had not treated the Masters fairly in the previous dozen years. It is, nevertheless, a clear statement of public policy that, from that point on, for compensation purposes the Masters are to be treated the same as Judges, and we must now consider whether there is any reason that the public policy should not be applied retroactively to some reasonable period.

As long ago as 1990 there was express recognition by the Province, via a report from the Civil Service Commission, that the need for judicial independence of the Masters was well recognized. This was confirmed on a number of subsequent occasions. For example, in 1993 the Executive Director of the Judicial Services Branch advised the Senior Master:

> **". . . Masters do not have the same guarantees of independence that exist for Judges . . . security of tenure is required . . . financial security must be provided . . . independence should exist with respect to matters of administration . . ."**

The problem was not difficult to identify, but it was not until 1999 that the Province

began to address the issue.

The solution, said the Masters, was simply to recognize the linkage with Judges and acknowledge that the linkage should never have been broken. If the Province had done its constitutional duty in 1989, said the Masters, this would not have happened. At a minimum some lengthy period of time, such as six years, should be recognized. The Masters should also receive (they said) the same pension and other benefits as the Judges (and be treated as part of the Judges' group).

Finally, the Masters requested reimbursement of their costs in connection with their submission, acknowledging that their costs would probably be "modest".

We have considered the requests of the Masters. Their specific submission is that we make recommendations with effect as of approximately April 1, 1997. We think that we ought to confine our recommendations for the Masters to the time commencing with our recommendations for the Judges, namely the period commencing April 1, 1999 (and for the Masters terminating as of July 5, 2001). It was in 1999 that, by legislation (which did not come into force until later), the Province formally recognized the fact that the necessary guarantees of independence mentioned as early as 1993 by the Civil Service Commission had to be enshrined in

legislation. There is thus some further logic in making a recommendation commencing in 1999.

We think that, commencing April 1, 1999, the Masters should receive the identical salaries and benefits, including pensions, vacations, sick leave, travel expenses, and allowances, as do the Judges and we recommend that for that period the necessary adjustments be made, with retroactive effect as required, to the Masters' entire compensation package.

Notwithstanding our conclusion that our recommendation should not pre-date 1999, the documents submitted to us clearly demonstrate that, for a considerable period of time preceding April 1, 1999, the Masters were not compensated properly. As a separate and distinct matter we strongly suggest that the Province take steps to rectify the historic situation of inadequate compensation for Masters. This suggestion is made by way of "moral suasion", which we hope will influence the Province, but we make no formal recommendation. Taking into account all the data we were given, we urge the Province to make a lump sum payment to each Master in full satisfaction of any inadequacy in compensation for any time prior to April 1, 1999. Such payment would be calculated for each individual Master with reference to the period of time that individual served as a Master after March 31, 1989 and prior to

April 1, 1999. For each such fiscal year (pro-rated as required) an appropriate amount for each individual would be $2,500.

Consistent with the provisions of Bill 46 (as an expression of public policy), the Senior Master is equated to the position of an Associate Chief Judge. We make an equivalent recommendation regarding the Senior Master, that the incumbent during the period in question (i.e., commencing as of April 1, 1999) receive the same salary and benefits, including pensions, vacations, sick leave, travel expenses and allowances, as we have recommended for the Associate Chief Judges.

The Masters should receive a contribution to their costs (calculated on the same basis as for the Judges) of 75% of their costs with the maximum amount payable by the Province set at $7,500. We have selected this number using the same rationale as set out earlier in our recommendation regarding the costs of the Judges.

We have not undertaken any specific costing analysis of the effect of these recommendations regarding the Masters. Neither participant, the Masters or the Province, made any submission on cost in relation to any recommendations that we might make for the Masters. This is fully understandable since the Masters comprise such a small group of five persons in total.

Our task would not have been possible to fulfill without the extremely able and highly professional role played by counsel for the Judges, Mr. Robb Tonn and Ms. Susan Dawes, and for the Province, Mr. E. William Olson, Q.C., and to a lesser extent in time but not in quality, by counsel for the Masters, Mr. John M. Scurfield, Q.C. Our thanks go to all counsel, their advisors, and to both consulting actuaries, for their significant effort, and their co-operation, in assisting this Committee to perform its statutory responsibilities.

All of which is respectfully submitted.

Dated at the City of Winnipeg, in Manitoba, this 19th day of April, A.D. 2002.

Martin H. Freedman, Q.C., Chair

Harold G. Piercy
(see attached)

Victor H. Schroeder, Q.C.
(see attached)

JUDICIAL COMPENSATION COMMITTEE
REASONS FOR DISSENT
VICTOR HAROLD SCHROEDER, MEMBER

I am generally in agreement with the recommendations contained in the Chairman's Reasons. This very specifically includes full support of the pension changes.

This is notwithstanding the point made by Mr. Olson that, over the previous decade, very substantial improvements have been made to salaries, pensions and other benefits for Judges. For instance, the last JCC had, in an environment of minimal general salary increases, recommended increased salaries to Provincial Court Judges by approximately 16% over two years plus very substantial supplementary pension benefits for service prior to July 1, 1992. These increases have been implemented.

He pointed out that the salary, pension and benefits effective March 1, 1998 is the base JCC 4 starts from and that there should be a rationale for any departure from that base other than, of course, general increases along the line of cost of living and GDP gains. He emphasized that we should not start from square one on each item every time and I certainly agree.

I am further fully in support of the recommendation for retroactivity to 1999 and agree that, if we had the jurisdiction to do so, we would have gone back further to provide additional retroactive benefits to the Masters who, until 2001, were not dealt with properly.

I support the substantive pension and other benefit changes (including very substantial, but somewhat lesser recommendations than my colleagues in terms of improvements to salaries) because of the changing environment not in general in Manitoba or Canada but, rather, because there has been a changing environment for Judges in other parts of the country and I believe that we are required to consider those changes as well as the circumstances of others in society both inside and outside Manitoba. This includes other senior public servants paid for directly by the taxpayers of the Province of Manitoba.

I disagree with the proposition, discussed at length in the majority report, that Judges can only be compared to other Judges and that it is either inappropriate or impossible to compare Provincial Judges to other senior Provincial public servants.

This concept, if correct, would be correct only Provincially but not Federally. For instance, this is not true for Supreme Court of Canada Judges nor is it true for Court of Appeal Judges, Federal Court Judges or Court of Queen's Bench Judges. In each of these cases, comparisons are made, among others, to other senior public servants working for the same entity rather than to Judges working for other entities. That is, Federally, Judges are compared to other senior public servants who serve the very same entity which is paying the salaries of both groups. I believe that this is as it should be.

Federal JCC's do, of course, go on to review other issues, including incomes of others and of lawyers in some of our larger cities, as well as recruitment and retention issues. This is the type of model which I believe ought to be followed in Manitoba. That is, Provincial Judges would be compared to other senior Provincial public servants who serve the very same entity paying the salaries of both groups, with other factors, such as the earnings of Provincial Court Judges in other Provinces and the incomes of Manitoba lawyers in urban, rural and northern settings, to be considered along with the earnings and circumstances of others.

There was a total absence of credible evidence before this FCC that the Provincial Judges Court is not attracting the very best candidates. There is no issue in Manitoba with respect to retention of Judges.

I thought Mr. Olson said it well when he suggested that determining who would be the best Judge by basing it on the prior salary or income of that individual as a lawyer would be wrong. Rather, the best judges are people with a sense of public service. They may very well be individuals who earn more or less, whether in private practice or working for the Crown.

JCC 1 in commenting on a Canadian Bar Association Report concluding judicial salaries need

not be set at a level equivalent to salaries earned by senior members of the private bar, said that

> "The most obvious reason is that this would tend to attract people to the bench for purely financial reasons. The type of person who might accept a position on the bench because it paid well may not be the best judge. There is a significant element of public service in this position."

The fact that the majority opinion in this case and in some other Provincial JCC's (but not Federal JCC's) has been that it is impossible to compare Provincial Judges with Provincial deputy ministers does not make it true that those comparisons are impossible.

I agree with the dissent of Mr. Benson to the JCC 2 Report, where he expressed the opinion that in fact job evaluation systems can be used to determine the appropriate classifications which determine fair salary levels for any particular set of occupations. Such job evaluation systems are widely used in both public and private organizations for positions at all levels. Such systems allow comparisons between doctors, prison guards, ship captains, fire fighters, grader operators, laboratory technologists, janitors, etc., who all are paid by the same entity. Job evaluation systems are in fact not used to equalize wages between different employers or jurisdictions but, instead, are used quite effectively to place a variety of individuals, with a variety of skills, performing vastly different tasks but all for the same entity.

I believe that this issue of job evaluation systems is worth examining in the future in that senior officer salaries in Manitoba are, and I believe should continue to be, a factor in determining Provincial Judges' salaries. Being a factor does not require absolute linkage.

I do not agree that all relevant issues with respect to Judges' salaries have been thoroughly addressed in the majority report. The decision of Mr. Justice Wright, while quoted therein, is then largely ignored. Let me repeat what he said at Paragraph 57 of his judgment:

> "The report of JCC Number 3 reveals a broad consideration of multiple factors in determining appropriate compensation and other benefits for Manitoba's Provincial Judges. The report shows the

> committee endeavoured to apply a fair balance between conflicting elements relating to judicial independence on the one hand and the economic realities of the Province on the other, all in the context of sensible comparisons with the position of Judges relative to others in our society both within and without Manitoba."

He approved of that standard.

I do not believe that we have in fact addressed sensible comparisons with the positions of Manitoba Judges relative to others (not only to other Judges) in our society within Manitoba and outside Manitoba.

There has in fact been a hierarchy Federally and Provincially throughout, between Judges and senior public servants. That fact has been recognized by all three previous JCC's, and specific comment has been made that within the hierarchy, there are ebbs and flows over time. I do not suggest that there must be some kind of a fixed distance between one position and the next. Some JCC's have specifically recommended changes to the hierarchy. That would of course only occur if the hierarchy was relevant. The hierarchy itself is only relevant if there is some comparability between the various position holders.

JCC 1 recognized the existence of the Provincial hierarchy insofar as it relates to Judges and senior officers in the employ of the same entity. It pointed out, at Page 8, that "if the Provincial Judges had been accorded this maximum in the Senior Officer 8 classification, then they would be earning an annual salary which is approximately $14,500.00 more than is presently paid". That maximum was $103,109.00 at the time and the recommendation of the Committee was that Judges be paid $95,570.00, over $7,000.00 less than Senior Officer 8. JCC 1 recognized, as well, that salary levels of senior civil servants were an indicator of the Province's ability to pay.

If there was no relationship between Judges and other public servants, why would JCC 1 have implied an appropriate relationship?

JCC 2 recognized as well that there is a Provincial hierarchy. At Page 9 of their report, they justified their salary proposals partially as follows:

> "This result does not seem to be inconsistent with the result which might be achieved by following the Province's suggested approach of a 'made-in-Manitoba' solution. A salary of $97,000.00 would place a Manitoba Judge at about 1% below the midpoint of the maximum salary for a senior Crown Attorney of Manitoba ($80,023.00) and the maximum salary for the Deputy Minister of Justice for Manitoba ($116,088.00). Such a relationship does not seem to be unreasonable and is not dissimilar from many other Provinces in Canada. This is not to suggest that the work of a Judge can be compared to that of a Crown Attorney or the Deputy Minister of Justice. It cannot. However, it is important that there be a reasonable differential between Judges' salaries and those of Crown Attorneys since, historically, about one third of the judicial appointees in Manitoba are recruited from the Attorney General's Department."

Again, why would there be a necessity for a reasonable differential if there was truly no comparability or hierarchy? Clearly JCC 2 did see a hierarchy in terms of pay within the Provincial entity, identifying a relationship of Judges to Crown Attorneys and Deputy Ministers at the mid-point as not only being reasonable but similar to other Canadian jurisdictions. The majority in JCC 4 ignores this point.

JCC 3 stated, at Page 12, that comparing judicial salaries to those of senior civil servants

> "is not without some merit. The rate at which a government pays its most senior civil servants is presumably a reflection of both its ability to pay as well as the marketplace for senior professionals with the highest levels of ability and qualifications.....Since 1981, Commissions appointed triennially have made recommendations on the salaries and benefits of Federal Judges and most of the Commissions have generally supported some measure of equivalence."

Having found that senior Deputy Ministers are paid at $116,000.00, JCC 3 goes on to state,

> "If salaries paid to senior civil servants in Manitoba are a proxy for the Province's ability to pay, then the recommended salary of $112,000.00 as of April 1, 1998, would seem to be reasonable for Manitoba Judges."

It must be emphasized that JCC 3 saw the salaries of Provincial Court Judges as reasonably being somewhat less than those of senior Deputy Ministers. The table on Page 27 of the Province of Manitoba submission shows that, following the recommendations of JCC 3, the Provincial Court Judges' salaries were at 94.6% of the salary of the Deputy Attorney General. JCC 3's recommendation of 94.6% was the highest percentage recommendation in recent history. Using that factor alone, without considering the substantial increases in pensions we are recommending, an end salary effective April 1, 2001 for Provincial Court Judges of $122,326.00 would be 94.6% of the $129,309.00 per annum currently paid to the Deputy Attorney General.

The majority dismisses this issue totally by stating, without producing any evidence, that there simply is no room for bargaining as between the Province and its Deputy Ministers. In fact, there has been a substantial amount of mobility in senior positions in the Attorney General's Department in Manitoba in the last several decades, including frequent reaching outside to hire staff including Tanner Elton, Graham Garson, Allan Fineblit and the current incumbent, all within the past two decades or so. The point is that the salary for Deputy Attorney General is sufficient to attract very competent, experienced senior counsel on a continuing basis, including outsiders from a variety of backgrounds.

While it is true that all three previous JCC's claimed that Judges were not comparable to anyone else, each of them in fact made a compensation decision specifically referring to the hierarchy and approving the fact that it did not change the hierarchy in a fashion that could be considered unfair from their perspective. Not having done anything more than slightly tinkering with the existing Manitoba pay hierarchy, previous JCC's statements as to comparability between Judges and senior public servants are in the end not necessary to their decisions.

This brings me back to Mr. Justice Wright's point that sensible comparisons need to be made

with the position of Judges relative to others in our society. I believe that the majority has focused almost exclusively on Judges without giving due consideration to other factors, including pay to other senior public servants employed by the same entity.

It appears that the only reason we are going to pay Judges substantially greater amounts than senior Deputy Ministers is that other Judges, not paid for by the taxpayers of Manitoba, have recently received substantial salary increases. While reference is made to the state of the economy and the general landscape, nothing specific, such as, for instance, an alleged improvement in the ability of taxpayers to pay accounts for the rationale for the recommended salary hike of 29% plus significant pension improvements from March 31, 1998 to April 1, 2001. There are no substantive comparisons of Judges to others, who are not Judges, either inside or outside Manitoba.

While I respect the fact that all of the other JCC's suggested comparisons with other Judges were the best comparators, it is also true that each of the three first JCC's could make their recommendations knowing that they were not changing the Manitoba context and specifically making the point that they were not doing so and that the comparison between the new salaries they were proposing for Provincial Court Judges and the salaries of senior civil servants would continue to be in realistic comparison. That is not the case for JCC 4.

The majority recommendation would move Provincial Judges' salaries from 94.6% of Deputy Attorney Generals to approximately 111.4% of the salary of the Deputy Attorney General plus substantially improving Judges' existing pension provisions, to a point far beyond those of other senior officers of the Province who, as previously indicated, are often recruited in the middle or latter stages of their careers.

It is true that all three previous JCC's have referred to the three Province average, being Nova Scotia, New Brunswick and Saskatchewan. Legislation for future JCC's takes that into account as I understand it in the sense that it requires the Legislature to approve salary recommendations which are not greater than that average.

I believe that this "ceiling" is somewhat artificial in that, if something happened in those three Provinces to substantially erode Judges' salaries to a point where they are not in line with senior public servants in Manitoba or the salaries of Manitoba Judges, or with what is appropriate for Manitoba Judges, we would be bound to make recommendations which reflect Manitoba reality.

Similarly, I do not see that "ceiling" as also being some kind of firm floor. No JCC should consider itself bound to follow the JCC's and Legislatures of those three jurisdictions where to do so would lead to an imbalance here in Manitoba. I believe that following those decisions in practical lock step without looking at other factors, as the majority proposes to do, places Manitoba in precisely that circumstance now.

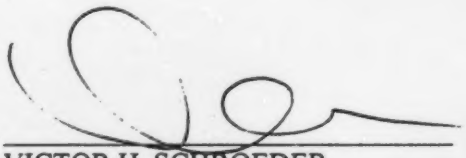
Having regard to all of the factors, including the economic realities of the Province, Judicial independence, recruiting and retention of Judges, sensible and realistic comparisons with the positions of Judges relative to others, the fact that substantial improvement to Manitoba Judges' pensions are being recommended herein making theirs the best Provincially funded pension in Manitoba by far, I would recommend that, for the year commencing April 1, 1999, Judges' and Masters' salaries advance to $120,000.00, that they advance to $128,000.00 for the year commencing April 1, 2000 and that they advance to $139,000.00 for the year commencing April 1, 2001. I would recommend as well that the differentials for Chief and Associate Chief Judges and Masters be in accordance with the recommendations of the majority.

That is substantially above the cost of living increases in the past three years, it does recognize the significant increases in judicial salaries in other jurisdictions and considers the salaries of other senior public servants paid by the same entity as well as the fact that, generally, salaries to others both inside and outside Manitoba have not substantially improved since 1999.

This recommendation, if implemented, would place Manitoba Judges for the first time at more than 7% above the salaries of senior Deputy Ministers. While I see that as being somewhat problematic given our history, it does, I believe, adequately take into account incomes of Judges elsewhere as well as take into account local realities. It is a compromise.

It would improve Judges' salaries very substantially against average wages and salaries in Manitoba and Canada between 1999 and 2002. It places Manitoba Judges' salaries somewhat below the three province average. This recommendation, while it does take into account and considers the salaries and benefits of other senior public servants in Manitoba, recognizes as well that there must be a balance between those considerations and all of the others, including the salaries of Judges paid by other entities. If I was not considering the salaries of other Provincial Judges, I would have recommended a salary increase in the range of half as large as the one I have proposed.

I would like to add that I do agree with all of the recommendations of this JCC excepting only its recommendation with respect to salaries. I do not, however, feel bound to the reasons supporting those recommendations in all instances.



VICTOR H. SCHROEDER

ADDENDUM

Re:

REPORT AND RECOMMENDATIONS OF THE JUDICIAL COMPENSATION COMMITTEE DATED APRIL 19, 2002

HAROLD G. PIERCY

I am concurring in the recommendations and reasons for those recommendations which are contained in the Judicial Compensation Committee Report, primarily because when viewed in the context of a "compensation package", I am of the opinion that our Report applies a fair balance between conflicting elements relating to Judicial independence on the one hand and the economic realities of the Province of Manitoba on the other hand.

While on a "stand alone" basis I may have discomfort with our decision respecting some of the specific recommendations concerning salaries and particularly pensions, and our decision to not make a positive recommendation relative to certain other issues before us, I nonetheless am concurring in the Report and Recommendations because I am comfortable with my belief that we have applied the "fair balance" approach which Mr. Justice Wright of the Court of Queen's Bench, wrote about in his decision rendered on July 27, 2001.

It may be said that when functioning as a member of a Judicial Compensation Committee it may be unwise to draw upon one's personal experience with

respect to "perceptions" which are often times created as a result of a rather simple analysis of an industrial relations economic settlement, an interest arbitration award; or, a recommendation of the kind we are required to render in this case.

Certainly it is correct that the Report recommends the implementation of what some may say is a rather high and/or out-of-the-ordinary **percentage** (%) increase in the salaries of our Manitoba Provincial Court Judges. Respectfully, an analysis of our recommendations viewed solely in that light is, in my opinion, faulty and far too simplistic. The test of fair and appropriate compensation for Judges is not (or should not be) based solely on the level of percentage (%) increases being recommended.

There were a myriad of issues put before us for consideration and recommendation, however it is my belief that the issue of appropriate salaries **and** appropriate pensions by far ought to take precedence over the other issues identified in the Report.

Those two issues (salaries and pensions) should not be viewed in isolation of one another, as both of them go directly to the heart of Judicial independence. While some of the other issues before us although viewed by us within the context of "Judicial independence", for myself these other proposals must give

way to the two (2) larger issues, all in the interest of producing what Justice Wright referred to as a fair balance between conflicting elements.

I will comment very briefly with respect to the issue of salaries and pensions, but before doing so I observe that there is an intrinsic relationship between salaries and pensions.

In the instant case, the level of the pension benefit is driven to a major extent by the salary levels **and** by a specified formula which is applied to the salary which produces the value of the pension(s). Because we believe that an appropriate pension plan (just as much as an appropriate salary) is essential to the principle of Judicial independence, it is particularly important to view those two aspects of compensation (salaries and pensions) in a non-severable context. That context has been addressed by us in section 8.5 of the Report as follows:

> *In coming to our salary recommendations we have taken into account the other recommendations in this Report and particularly the recommendations dealing with pensions. We are basing our entire Report and recommendations on a total compensation model and were it not for our pension recommendations, our salary recommendations would be higher (underlining mine)*

Salaries: Perhaps not unexpectedly, legal counsel for the participants offered a quite different vision as to the primary factors which ought to influence our recommendation.

For the judges, it was advanced (amongst other things) that Judicial salaries throughout the country, should not vary ideally by more than ten (10%) percent, and at maximum by twenty (20%) percent. I have some trouble with that proposition, because amongst other things, it could leave little room for the applicable other factors which we should be considering as we attempt to find an appropriate recommendation having regard for all the factors we should be considering as we attempt to find the "fair balance" which Justice Wright wrote about. Furthermore, from my perspective, I would have concerns about arbitrarily applying a strict percentage factor as has been suggested, because amongst other concerns, I do not know how we could justify the percentage figure selected, and how that would be blended with other factors which we ought to be considering as well.

For the Province – it was advanced (amongst other things) that the salaries of Manitoba Provincial Court Judges should particularly bear a relationship to Senior Deputy Minister's salaries in the Manitoba Civil Service. I have some trouble with that proposition as well.

It is axiomatic to say that as a general observation Senior Deputy Ministers are charged with important and challenging responsibilities. That said, they primarily function as managers and administrators. Judges on the other hand, are charged (amongst other things) with dealing with weighty matters, which affect the rights and liberties of our citizens.

It is correct that both groups, that is the Judges and Deputy Ministers, are paid from the same Provincial Treasury, but with respect to duties and responsibilities, those are enormously different and therefore a disproportionate influence ought not to be attributed to the salary comparisons as between these two (2) groups of provincially paid individuals.

This member of this Judicial Compensation Committee has been a member of all Judicial Compensation Committees since the Provincial Court Act was amended in 1989 to create Judicial Compensation Committees. All of those committees, in their recommendations concerning salaries have been influenced to a large (but not exclusive) extent by the average salaries paid to Provincial Court Judges in the Provinces of Nova Scotia, New Brunswick and Saskatchewan. Given all the factors at play in respect of the period under review by us, I see no reason for us at this time to depart from giving appropriate weight to that relationship, with one critical proviso – that proviso is that the pension improvements would be implemented as we have recommended, and would constitute an integral part of the **total compensation package.**

Had it not been for the pension improvement recommendations, I would have recommended a significantly higher salary arrangement. The percentage issue (as discussed earlier) aside, I believe now that a case can be made for a compensation arrangement for Manitoba Provincial Court Judges in the range of

the average of the compensation packages available to **Judges** who serve in all jurisdictions in Canada.

Within that average, it is reasonable to include compensation paid to Federally appointed Judges, but I would exclude Manitoba Judge's compensation from the calculation.

We are **not** bound by "Bill 46" but it is of interest of note the following provision as one of the factors for consideration by subsequently appointed committees.

> *The manner in which the compensation package paid to Judges in Manitoba compares to Judicial compensation packages in other jurisdictions in Canada, having regard to the differences between jurisdictions.* (Underlining mine)

This particular provision and other factors cited in Bill 46, do not apply to this Judicial Compensation Committee, but it at least gives us some insight in a legislative way as to future policy of the Government of Manitoba.

I raise this solely for the purposes of commenting that the legislature in enacting this provision, has focused on **Judges** and has not confined the comparison only to other Provincial Court Judges.

Pensions: As I have earlier written, this area of compensation is equally as important as salaries. The Province, amongst other things, submitted that the

issue of pensions must be viewed in relation to the fact that in Manitoba currently there is no mandatory retirement age for Provincial Court Judges unlike other jurisdictions. (section 9.3, Report)

I view that consideration in a somewhat different light. The concern I have is that the Pension benefits (relatively speaking) are so low in Manitoba compared with other jurisdictions, that a Manitoba Judge may feel it necessary by virtue solely of economic circumstances, to remain as a member of the Bench longer than perhaps he/she should continue as a Judge.

The pensions available to Manitoba Provincial Court Judges, as the Report has commented, in comparisons with the average of the three (3) earlier referenced Provinces, are substantially lower and in the case of certain other jurisdictions, are lower by even a much greater margin.

In the interests of Judicial independence and in the interests of there not being a significant economic detriment to a Judge retiring from the Bench at an "appropriate" time, this deficiency needs to be addressed.

Other issues: A primary thrust of the Judges position was that their compensation and related conditions ought to be generally considered within a the framework of a **professional** model. I completely agree with Mr. Tonn's position on that point. The usually highly structured employment conditions

which are traditionally at play within the framework of a **labour-management** employment model, in my view are not in complete harmony within the general framework of a **professional** model.

Certain of the **other issues** advanced by the Judges, in my judgement fall within the framework of a labour management model. That said, it is difficult to anticipate that common sense would not prevail with respect to matters such as compassionate leave, family related leave, maternity/paternity and adoptive leaves.

Still with respect to certain of the **benefits** area, had it not been for the costs of our recommendations, regarding salaries and pensions, I may have been amenable to persuasion, particularly with regard to:

- **Life Insurance:** It is not an unreasonable proposition that life insurance not reduce until age 65 and thereafter incrementally reduce to age 75 and then a fixed amount (e.g. $5,000.00) remain in effect and become payable to the Judges estate at the time of his/her death.

- **Extended Health Care Benefit**: I believe it is not too general a proposition to say that as one ages the greater is the potential for utilizing a prescription drug plan. The average age of the population of the Manitoba Provincial Court Judges is 59.9 years.

The existing annual maximum of $200.00 for Judges is a benefit of limited value.

- **Travel Expenses:** Judges should be provided with a **reasonable** allowance with respect to meals and related expenses and should not necessarily be restricted to Government approved hotels – the operative work is **reasonable**.

- **Vacations:** It is generally an accepted concept that the purpose of an annual vacation is to provide an individual some time each year away from the workplace and to, amongst other things, afford time for relaxation and to generally rejuvenate oneself. Some of the information we have before us (section 11.2 of the Report) relates the following information as to **carry-over** of vacations:

  - 21 Judges have up to 30 days
  - 14 Judges have between 31 and 60 days
  - 1 Judge has 64 days
  - 1 Judge has 89 days
  - 1 Judge has 99 days
  - 1 Judge has 105 days
  - 1 Judge has 147 days

One can imagine that if there were to be a large number of Judges opting to utilize their "carried-over" vacations at the same time, in conjunction with their current earned vacation, courtroom scheduling could be compromised.

It is not a recommendation which is to go to the legislature, but it seems that the Manitoba Provincial Court Judges Association, before seeking any improvement in vacation entitlement, may want to consider a methodology for bringing about a process to address the described circumstances.

- **Masters of the Court:** I do not believe it is an understatement to say that these Judicial officers of the Court of Queen's Bench have been treated unjustly for a number of years. Over the years there was a good deal of talk and written communications exchanged between the Masters and Government officials about rectifying the inadequacies with respect to appropriate compensation. The talk did not manifest itself into action.

  It was not until approximately July 6, 2001 that some relief was provided to the extent that from that date forward, the Masters began to be paid at the same salary level as the Provincial Court Judges.

  To its credit, the present Government brought about this change in compensation on a henceforth basis, and amended the law such that in the future the compensation for Masters would be dealt with concurrently with the review of the Provincial Court Judges Compensation.

> We have concluded that we ought to confine our retroactive recommendations for the Masters to the period commencing April 1, 1999. Quite frankly, I would have preferred that our recommendation reach further back than April 1, 1999 for the Masters.
>
> By any objective analysis, these Masters have been treated unfairly in the previous dozen or so years. There is also no doubt in my mind that if the Province declines to implement our "moral suasion" suggestion as referenced in section 12 of the Report, the Province of Manitoba by its neglect and default will have unfairly benefited by its self-serving delay. That would indeed be unfortunate.

So that no misunderstanding arises, nothing in this addendum is intended to change or alter my concurrence in the Report. In the event it is said there is something explicit or implicit in what I have written that conflicts with the Report, then the Report shall prevail.

Finally, I want to emphasize the concluding comments in the Report with respect to the quality of the submissions. This process is unique in that there are participants but there are no "parties" in the traditional sense. Accordingly, there are no winners and losers – hopefully, the consensus will be that it is the process which has won by virtue of us having arrived at a balanced set of recommendations.

The quality of the written and oral submissions by Mr. Olson and by Mr. Tonn and their associates and support persons was nothing short of outstanding. To say that their submissions were "helpful" or "of value and important" is to understate the quality of their input and assistance to us in our deliberations. Mr. Scurfield played a lesser role in the proceedings but his assistance on behalf of the Masters was likewise extremely helpful and of great value.

DATED at Winnipeg, Manitoba this 15th day of April, 2002.

Harold G. Piercy
Member Judicial Compensation Committee